Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal,

Petitioners,

vs.

MARK J. WEHRLI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether federal courts may adjudicate issues previously and finally decided in state administrative proceedings solely because the state procedure did not provide for judicial review.

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CITATIONS TO OFFICIAL AND/OR UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on April 27, 1999, and is reported at 175 F.3d 692.

The order of the United States Court of Appeals for the Ninth Circuit, denying Petitioner's Petition for Rehearing En Banc, was filed and entered on June 11, 1999.

BASIS FOR JURISDICTION

(i) Original jurisdiction in the District Court was 42 U.S.C. § 1983.

(ii) Jurisdiction was conferred on the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291.

(iii) Jurisdiction of the United States Supreme Court is conferred pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. 42 U.S.C. § 1983

Section 1983. Civil Action For Deprivation Of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. 28 U.S.C. § 1738

Section 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.

"The acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affirming the seal of such state, territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories or Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

STATEMENT OF THE CASE

Respondent, a Deputy Marshal for Petitioner, the County of Orange, California was discharged from employment because a medical condition rendered him unable to serve in a law enforcement position. App. 1-2. After initiating this action under 42 U.S.C. § 1983, Respondent then voluntarily chose to pursue his claims in an administrative forum under the "Marshall's Court Personnel Rules and Regulations." App. 3. That administrative hearing took place within two weeks of the Respondent's discharge and resulted in his reinstatement. Respondent however lost his claims for back pay and for a finding of a constitutional deprivation. App. 3-4.

The rules governing the hearing stipulated that it was binding on the parties and therefore not subject to judicial review. App. 3. In addition, the proceedings were entirely judicial, presided over by a state court judge, conducted pursuant to the California Rules of Court, and each party was represented by counsel.

Following the administrative adjudication Respondent moved to reinstate this civil rights action. The district court however concluded that " . . . [t]he municipal court judge addressed the same issues in his decision that are now before the court" and granted summary judgment in favor of Petitioner. App. 4.

Respondent appealed to the Court of Appeals for the Ninth Circuit. On April 27, 1999 that court, with one judge dissenting, reversed the District Court, finding that issue preclusion was not required. App. 1-6. Despite the judicial nature of the administrative proceedings, and without disputing the District Court's finding that the

issues presented in the subsequent civil rights suit were identical to those already adjudicated by the state court judge, the court below held that issue preclusion would not apply solely because the state administrative process was not subject to judicial review. Petitioner sought rehearing *en banc* which request was denied (with one judge dissenting), on June 11, 1999. Thus this Petition for Certiorari seeking review of that decision seeks review of the decision below.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has, without precedent, improvidently eroded time-honored principles regarding the preclusive effect given state administrative findings in subsequent federal litigation between the same parties involving the same issues. Breaking new ground, the Ninth Circuit has held that the preclusive effect of a state administrative adjudication of an issue will be denied in subsequent federal litigation of the same issue if the state adjudication is not subject to judicial review. Thus, the lower court concluded: " . . . that the district court erred in giving collateral estoppel effect to the state administrative decision because that decision was not subject to judicial review." App. 4.

The lower court has conclusively presumed that because of the absence of judicial review alone the Respondent " . . . did not have an adequate opportunity to litigate his claim in the administrative proceeding

within the meaning of *Elliott*[1] *and Utah*[2]." In short, the court below has announced a conclusive presumption that binding administrative judicial procedures do not afford the party aggrieved with a full and fair opportunity to litigate the issues in dispute for pruposes of precluding subsequent federal litigation over the same issues.

In this case the Respondent voluntarily elected to proceed with a prompt and binding judicial administrative proceeding with a state court judge adjudicating the very issues he seeks to advance in this litigation. App. 3-4. Moreover, the parties were represented by counsel and the proceedings were governed by the California Rules of Court. App. 3. Pursuant to the rules governing the process, the state court judge's findings were binding on the parties. That is, by voluntarily electing this process, Respondent agreed that he would also " . . . relinquish any current or future claims to sue or obtain remedy through any other court appeal procedures." App. 3.

Indeed the procedure chosen by Respondent had much to commend it, as it was both speedy and effective. As the dissent below noted, Respondent " . . . got back to work almost immediately by means of the administrative process . . . [h]e got fired December 23, 1994 and got his

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[1] *University of Tennessee v. Elliott*, 478 U.S. 790 (1986)

[2] *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966)

administrative determination reinstating him January 5, 1995 . . . "[3] App. 10.

Nevertheless and notwithstanding the undeniable judicial nature of these proceedings, and notwithstanding Respondent's voluntary election to proceed in that forum, not to mention the absence of even a suggestion of caprice in the state determinations, this administrative process has now been conclusively deemed inadequate for purposes of issue preclusion.

There is scant, if any, support for this holding. This court has never adopted the rule that a party voluntarily choosing a state judicial administrative forum to litigate his claims could thereafter relitigate the same issues in federal court merely because the state proceeding was not subject to judicial review.

In *University of Tennessee v. Elliott*, 478 U.S. 790 (1986) this court addressed the preclusive effect to be given state administrative determinations in the context of a subsequent civil rights claim. *Id.* at 792-3. Although the administrative proceedings in *University of Tennessee* were not binding on the parties as is the case here, that fact was not, in our view, the basis for this court's determination that preclusion was appropriate.[4] Indeed, this court in *Elliott* reaffirmed the teachings of *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) that

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[3] It was not a complete victory for respondent as he was denied his claims for back pay and lost his claim to constitutional deprivations.

[4] In that case judicial review was in fact not sought by the aggrieved party – although it was available. *Elliott, supra* at 792.

" . . . when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . ' preclusion is compelled." *Id.* at 799. quoting: *United States v. Utah, supra* at 422. There is nothing in this court's opinion in *Utah* or its progeny that supports the lower court's finding that *Utah's* " . . . adequate opportunity to litigate" of necessity forecloses binding judicial administrative proceedings voluntarily adopted by the parties.

Other circuits have given some attention to the issue presented here. See: *Crossroads Cogeneration v. Orange and Rockland,* 159 F.3d 129 (3rd Cir. 1998); *Gjellum v. City of Birmingham,* 829 F.2d 1056 (11th Cir. 1987); *Frazier v. King,* 873 F.2d 820 (9th Cir. 1989). In *Crossroads, supra, dicta* suggests that in some contexts the Third Circuit might indeed require " . . . the possibility of a chain of appellate review" as a prerequisite to a "full and fair opportunity to litigate . . . "for purposes of issue preclusion. *Id.* at 137. In *Gjellum, supra,* however the Eleventh Circuit in a thoughtful analysis noted that *issues* actually litigated in unreviewed administrative proceedings may be afforded preclusion in subsequent federal litigation, while *claims* not actually presented before the administrative officer would not be precluded. *Gjellum, supra* at 1070.

Finally, in *Frazier v. King, supra,* the Fifth Circuit apparently agreed with *Gjellum* as respects *claim* preclusion arising from unreviewed state administrative findings. *Id.* at 8245. However, the *Frazier* court did not reach the question of whether federal *issue* preclusion would

apply because there, unlike California, " . . . Louisiana courts have not adopted the doctrine of collateral estoppel." *Id.* at 825.[5]

Thus it is clear that only the Ninth Circuit has gone so far as to deny preclusive effect to state administrative adjudications of issues simply because they were not subject to judicial review, regardless of the fairness and judicial nature of such proceedings.

In our view the decision below seriously erodes important policy considerations underlying the doctrine of preclusion.[6] In addition, the practical effect of the holding below is sweeping. For example, in the context of governmental employee employment-related claims, virtually every binding administrative proceeding, regardless of its judicial character and voluntary selection, is vulnerable to collateral attack in subsequent federal litigation.

The divided lowered court's decision conclusively presumes a party has not " . . . had a full and fair

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[5] The majority below however acknowledged that "California does give preclusive effect to state administrative decisions . . . under the guidance of *Utah Construction.*" App. 8. Of course the majority assumed that unreviewed administrative adjudications can never provide the parties an adequate opportunity to litigate.

[6] See: *Elliott* at 797 Where this court noted that "[W]e have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity" *Id.* at 797. This court further noted that "[h]aving federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism" *Id.* at 798.

adequate opportunity . . . " to litigate an issue[7] based entirely on the unavailability of judicial review. This *per se* approach, in our view, is contrary to *Utah* and *Elliott* and also is at odds with the approach favored in at least two other circuits. See e.g. *Gjellum, supra* and *Frazier, supra.* In both *Gjellum* and *Frazier* careful attention was paid to what was, and was not, actually litigated in the administrative forum for purposes of subsequent issue preclusion. *Gjellum* at 1059; *Frazier* at 823. This is of course no longer important in the Ninth Circuit, where the only question is whether or not the procedure permits subsequent judicial review of the administrative findings.

Beyond the confusion which the decision below injects into this important area of the federal-state judicial relationship, there are solid policy concerns urging that this Petition be granted. First, the public's interest in the preservation of judicial resources is ill-served by a conclusive presumption that binding judicial administrative proceedings are inadequate. Next, the very reasons these binding administrative processes exist – speed and finality – is destroyed by the notion that a second federal "bite of the apple" is available. As this court previously observed, the principle was articulated well by a noted authority on administrative law:

> "The law of *res judicata*, much more than most other segments of law, has rhyme, reason, and rhythm – something in common with good poetry. Its inner logic is rather satisfying. It consists entirely of an elaboration of the obvious

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[7] *United States v. Utah Construction & Mining Co., supra* at 422.

> principle that a controversy should be resolved once, not more than once. The principle is as much needed for administrative decisions as for judicial decisions. To the extent that administrative adjudications resemble courts' decisions – a very great extent – the law worked out for courts does and should apply to agencies,"

University v. Tennessee, supra at 998 n.6, quoting: 4 K, Davis, Administrative Law Treatise § 21.9. p. 78 (2d ed. 1983).

Finally, the essence of the Full Faith and Credit Clause, recognized by this court as a guide " . . . in fashioning federal common law rules of preclusion." is certainly not given deference by this decision. *University of Tennessee, supra* at 799. Thus, this court has observed "[p]erhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force, and this purpose is served by giving preclusive effect to state administrative factfinding rather than leaving courts of a second forum, state or federal, free to reach conflicting results." (Note omitted) *Id.* at 799.

In our view the decision below is of enough impact and invites sufficient confusion and strain in our federal judicial system to warrant review by this court.

CONCLUSION

Based upon the foregoing we respectfully suggest that this Petition for Certiorari be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK J. WEHRLI, *Plaintiff-Appellant,* v. COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal, *Defendants-Appellees.*	No. 97-55040 D.C. No. CV-95-00042-GLT OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
May 4, 1998 – Pasadena, California

Filed April 27, 1999

Before: William C. Canby, Jr. and Andrew J. Kleinfeld, Circuit Judges, and William W Schwarzer,[1] District Judge.

Opinion by Judge Canby; Dissent by Judge Kleinfeld

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[1] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Michael P. Stone, Muna Busailah, Marc Berger, Michael P. Stone, Pasadena, California, for the plaintiff-appellant.

William F. Bernard, Lynbert & Watkins, Santa Ana, California, for the defendants-appellees.

OPINION

CANBY, Circuit Judge:

Plaintiff-appellant Mark Wehrli brought this action pursuant to 42 U.S.C. § 1983, claiming that certain actions of his employer, Orange County, California, violated his federal constitutional rights. The issue for decision on this appeal is whether an earlier state administrative adjudication of Wehrli's claim, which he voluntarily precipitated, is to be given preclusive effect in the present proceedings. We conclude that the administrative ruling is not preclusive, and we accordingly reverse the district court's summary judgment in favor of the County.

BACKGROUND

Wehrli, a Deputy Marshal at the Orange County courthouse, suffered an off-duty epileptic seizure, and so advised his employer. A county physician restricted Wehrli to light duty for the next five years, the period following an initial seizure during which there remains a significant risk of recurrence. The County informed Wehrli that it had no light duty positions for a Deputy Marshal and instead offered him a clerical position. The County conditioned this offer on Wehrli's waiver of his

right to challenge his removal from the Deputy Marshal position, and the waiver of any right to eventual reemployment as a Deputy Marshall. Wehrli refused to waive these rights and was discharged.

Wehrli then filed this 42 U.S.C. § 1983 action in district court, challenging his discharge as a violation of due process. Shortly thereafter, all proceedings were stayed because of the County's bankruptcy. During the stay, Wehrli opted for an administrative hearing on his claims, as provided by the Marshal's Court Personnel Rules and Regulations. A municipal court judge presided over the hearing. Wehrli was represented by an attorney and was allowed to present evidence and cross-examine opposing witnesses. The hearing was not recorded, however, and the hearing rules provided that "the decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review."[2]

The hearing officer found that, in light of the updated medical record, particularly new information about the effect of medication on Wehrli's condition, Wehrli was fit to serve as a Deputy Marshal. He therefore reinstated him to that position. The hearing officer also found, however, that Wehrli had failed to present key information from his own physician to the County. He determined that "Deputy Wehrli's inaction in providing information to [the County] was a substantial factor leading to his termination." He concluded that the County

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[2] The rules also state that "[i]f the grievance/appeal is decided by a judge, the grievant/appellant and ADMOC relinquish any current or future claim to seek or obtain remedy through any other Court appeal procedures."

acted reasonably in discharging Wehrli and that Wehrli was not entitled to backpay. The hearing officer also found that the County did not violate any of Wehrli's rights by conditioning its offer of a clerical position on Wehrli's waiver of his appeal rights.

When Orange County emerged from its bankruptcy, Wehrli moved to reactivate his federal action. The district court noted that the administrative hearing officer had "addressed the same issues in his decision that are now before the Court." It found that the administrative hearing had adequate judicial safeguards, and that, by opting for such a hearing under its applicable rules, Wehrli had waived his right to judicial review of that decision. The district court concluded that Wehrli was collaterally estopped from relitigating the issues underlying his § 1983 claims. Wehrli appeals.

DISCUSSION

Is the State Administrative Proceeding Entitled to Preclusive Effect?

Wehrli's principal challenge to the district court's decision is a relatively narrow one. He argues that the district court erred in giving collateral estoppel effect to the state administrative decision because that decision was not subject to judicial review. We conclude that WEHRLI is correct.

There is no doubt that, as a general matter, a state administrative decision can have preclusive effect upon a federal § 1983 claim. The Supreme Court so held in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). That case, too, dealt with a state administrative decision that had

not been subjected to judicial review, but such review had been available under state law; the plaintiff had simply failed to avail himself of it. In finding the administrative decision to be preclusive, the Supreme Court pointed out that the full faith and credit statute, 28 U.S.C. § 1738, does not require federal courts to give force to unreviewed state administrative proceedings. *Id.* at 794. The Court added, however, that "we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." *Id.* The Court then held, with regard to preclusion of the plaintiff's § 1983 claim:

> [W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *[United States v.] Utah Construction & Mining Co.*, [384 U.S. 394,] 422 [1966], federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State courts.

Id. at 799 (footnote omitted). We have held that this same principle applies to legal as well as factual rulings of an administrative body. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032-33 (9th Cir. 1994).

Wehrli argues that the unavailability of judicial review means that he did not have "an adequate opportunity to litigate." There is sound support for his view. Although the Supreme Court in *Elliott* did not elaborate on the essentials of an "adequate opportunity," it quoted *Utah Construction* for the requirement. *Utah Construction* gave preclusive effect to an administrative decision with the observation that "both parties had a full and fair opportunity to argue their version of the facts and an

opportunity to seek court review of any adverse findings." *Utah Construction*, 384 U.S. at 422. Our cases, too, suggest that the availability of judicial review is a crucial factor in determining preclusive effect. In *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), we accorded preclusive effect where judicial review of the administrative adjudication was available but unused, stating:

> *If an adequate opportunity for review is available*, a losing party cannot obstruct the preclusive use of the state administrative decision simply by foregoing her right to appeal.

Id. at 719, n.12 (emphasis added); *see also Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988). Similarly, we held in *Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), that a plaintiff had had an "adequate opportunity to litigate" because "[h]e had an opportunity, which he chose not to take, for judicial review, and even for the presentation of evidence in the reviewing court to demonstrate procedural irregularities by the board." *Id.* at 630.

In *Miller*, 39 F.3d at 1038, we rejected a claim that preclusive effect must be denied because the administrative decisionmakers were not necessarily lawyers, stating that "the availability of judicial review, even if not always determinative, is of critical importance here." *Id.* We do not draw from this statement an implication that, when the decisionmaker is a lawyer or judge, judicial review is unnecessary for preclusive effect. That issue was not before us in *Miller*, and the rationale of both *Plaine* and *Eilrich* militate in favor of the availability of judicial review as a requisite for preclusive effect. Certainly the fact that Wehrli's hearing officer was a judge adds to the judicial character of the proceedings and the likelihood of

a fair hearing, but individual hearing officers are capable of occasional arbitrary action even if they are judges.[3] Indeed, the Restatement, which California generally follows in these matters, *see Anderson-Cottonwood Disposal v. W.C.A.B.*, 185 Cal. Rptr. 336, 340 (App. 1982), flatly denies preclusive effect to a *judicial judgment* when "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." Restatement, Second, Judgments § 28(1). The reasons for this proscription apply to Wehrli; with no administrative record and no judicial review, Wehrli would have no way of correcting arbitrary administrative action if any occurred. We agree, therefore, with the Third Circuit that "the issue of a 'full and fair' opportunity to litigate includes the possibility of a chain of appellate review." *Crossroads Cogeneration v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 137 (3d Cir. 1998) (construing similar New York law); *see also Convalescent Ctr. v. Dept. of Income Maintenance*, 208 Conn. 187, 195-202, 544 A.2d 604, 608-11 (Conn. 1988) (holding that access to judicial review is a necessary precondition to administrative collateral estoppel).

We do not accept the County's view that Werhli [sic] is in the position of one who chose to forego available review. It is true that Werhli [sic] was not *required* to invoke the administrative process, but that will often be the case. The rules of the administrative process themselves foreclosed judicial review; Wehrli had no choice

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[3] Our statement is not to be taken as implying error by the hearing officer in Wehrli's case; the merits of his decision are not before us.

between review or no review. He did not waive judicial review in any sense meaningful for the purposes of res judicata or collateral estoppel. We conclude, therefore, that Wehrli did not have an "adequate opportunity to litigate" his claim in the administrative proceedings, within the meaning of *Elliott* and *Utah Construction*. The state administrative decision is therefore not entitled to preclusive effect as a matter of federal common law.

We also point out that *Elliott* requires federal courts to accord only that preclusive effect that the state would give to its own proceeding. California does give preclusive effect to state administrative decisions, but it does so under the guidance of *Utah Construction*. *See People v. Sims*, 32 Cal.3d 468, 479, 651 P.2d 321, 328 (1982); *see also Plaine*, 797 F.2d at 720. Thus, in giving an agency decision preclusive effect against a county, the California Supreme Court pointed out that one of the factors indicating that the administrative agency had acted in the "judicial capacity" required by *Utah Construction* was that "the County had both the right to seek a rehearing before the agency and the right to petition for review in superior court." *Sims*, 32 Cal.3d at 480, 651 P.2d at 328. We have found no California case according res judicata or collateral estoppel effect to an administrative decision for which judicial review was not available.

We conclude, therefore, that neither federal nor California law would give preclusive effect, under the doctrines of res judicata or collateral estoppel, to a state administrative proceeding not subject to judicial review.

CONCLUSION

The judgment of the district court is reversed, and the matter is remanded to the district court for further proceedings.

REVERSED and **REMANDED.**

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Wehrli claimed that he was wrongfully fired as a deputy marshal because of his handicap, epilepsy. He wanted to avoid the delay of judicial proceedings, so he elected to pursue a state administrative procedure to obtain a remedy. The procedure is voluntary. Wehrli was free to pursue all his remedies under the law. But by electing to use the administrative procedure, he subjected himself to rules waiving alternative procedures and judicial review. Rule D(8) of the Court Personnel Rules and Regulations said "[t]he decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review." In cases where the grievance was decided by a judge pursuant to the procedure (a municipal court judge decided this case), Rule D(1) provided that both the person bringing the grievance and the Association of Deputy Marshals of Orange County "relinquish any current or future claim to seek or obtain a remedy through any other court appeal procedures."

The hearing officer rendered a split decision. He held that "based on the medical information available to Marshal Carona . . . Carona acted reasonably in discharging

Plaintiff." But based on newly available medical information, the hearing officer held that Wehrli was entitled to reinstatement. Because the discharge had not been wrongful, Wehrli was not entitled to back pay. Thus Wehrli obtained part of what he sought, reinstatement but no money award.

Despite the express provision that by using the administrative provision he would "relinquish any current or future claim to seek or obtain remedy through any other court appeal procedures," Wehrli is here seeking the remedy he relinquished. He argues that were he not permitted to do so, a person in his position "would be caught between Scylla and Charybdis, where they would have to choose between going directly to federal court to seek vindication of their federal rights . . . , or exercise their due process right to a grievance procedure. . . . " Well, yes. Wehrli was free to choose, and he made a choice. He could choose between the advantages of the judicial process, appealability, discovery, and perhaps greater accuracy, and the advantages of the special administrative process he elected, speed, economy, and finality.

Speed, economy and finality have a lot to recommend them in a case involving a person's job. To some aggrieved employees, it will be worth risking an unappealable mistake to get them. Wehrli, after all, got back to work almost immediately by means of the administrative process of which he now complains. He got fired December 23, 1994, and got his administrative determination reinstating him January 5, 1995, immediately after the holidays. It is hard to imagine that any judicial proceeding could have gotten him working again that fast. If he

had lost, he probably could have found another job long before obtaining any relief in judicial proceedings, and gone forward with his career. An aggrieved employee might reasonably elect a remedy that gets his dispute resolved quickly, inexpensively and finally, instead of a slow, expensive remedy with perhaps higher accuracy. It is impossible to have both, because judicial review necessarily entails delay, lack of finality, and expense.

Wehrli has now somehow converted his claim, which would ordinarily be under the Americans With Disabilities Act, into a section 1983 claim. His theory seems to be that the County's offer, which Wehrli rejected, of a light duty job if Wehrli would waive his rights to appeal administratively and to a deputy marshal's job, took away a property right he had in his job without due process of law. It is not clear to me that he can avoid the restrictions on ADA remedies by restating his claim under 42 U.S.C. § 1983, but that issue has not been the focus of the arguments raised. The case has been argued in terms of whether the state administrative proceeding is entitled to preclusive effect, which the district judge gave it. I believe that it is, and would affirm.

Not a single case that the majority cites holds or even says in dictum what today's majority holds, that state administrative determinations cannot be given preclusive effect if they are not subject to judicial review. All the cases the majority cites for the proposition that "the availability of judicial review is a crucial factor in determining preclusive effect" are cases in which preclusive effect was in fact given. None denied preclusive effect. None said that availability of judicial review was "a crucial factor," as the majority holds. The holding in

every one of those cases – *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), *Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988), *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986) – was that preclusive effect should be given to an administrative determination. In every case, judicial review was available, so there was no occasion for deciding whether, were it not available, preclusive effect would still be given. There could therefore be no holding to that effect. And none of the language in the cases amounted even to dictum that availability of judicial review is a prerequisite to preclusive effect.

I must concede that there is also no case that I have found holding the contrary, that preclusive effect will be given to an administrative proceeding such as the one in the case at bar despite the lack of availability of judicial review. But I think a fair reading of the precedents suggests that that is the correct result, at least where submission to the administrative proceeding is voluntary. We need not reach the question whether preclusive effect would be given to a mandatory state administrative procedure with no provision for judicial review.

The critical cases are *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). *Utah Construction* strongly suggests that judicial review of the administrative determination is not a prerequisite for preclusive effect. Though not on all fours, those two cases appear to me to mean that the district court was correct in this case to give preclusive effect to the state administrative determination.

In *Utah Construction*, the Board of Contract Appeals had authority to resolve one kind of dispute, but not another. The Court held that its findings of fact in the kind of dispute within its jurisdiction were binding in a Court of Claims proceeding on disputes outside the Board's jurisdiction. The findings were "final and conclusive" and subject only to very limited judicial review, under the Wunderlich Act. The Court repudiated the notion that *res judicata* principles did not apply to administrative proceedings, and stated what have come to be known as the "*Utah Construction* factors":

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Id. at 422. These factors are met in the case at bar. Judicial review is not among the factors the Court specified. The Court did not say that appealability is a critical part of "acting in a judicial capacity" or "adequate opportunity to litigate." Because the fact findings of the Board of Contract Appeals were, as a practical matter, not subject to judicial review, *Utah Construction* is more consistent with the proposition that judicial reviewability is *not* essential to "acting in a judicial capacity" or "adequate opportunity to litigate."

The Court held that state administrative proceedings have preclusive effect in a federal section 1983 case, in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), The case at bar, whether it ought to be or not, is a section 1983 case, so *Elliott* controls unless properly distinguished.

The Court held that the state administrative determination could not be given preclusive effect in a Title VII claim, because the federal statute expressly provided that state proceedings were to receive "substantial weight" and Congress did not intend for them to have preclusive as opposed to "substantial" weight. Because of the congressional intent to allow pursuit both of state and federal remedies, the fact that the state proceeding was requested rather than compelled did not matter. *Id.* at 796, n. 5.

But for section 1983 claims (which is all we have in the case at bar), the Court held that the state proceeding *did* have preclusive effect. *Elliott* says that application of *Utah Construction* to state administrative proceedings "serves the value underlying general principles of collateral estoppel: enforcing repose." *Elliott*, 478 U.S. at 798. The Court quoted Davis on Administrative Law with approval, that "a controversy should be resolved once, but not more than once," *id.* at 798 n. 6, serving the value of "avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." *Id.* The Court did not mention availability of judicial review, just the *Utah Construction* factors quoted above, as the prerequisites for preclusive effect of state administrative determinations.

Our cases are consistent with the analysis above. *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988), holds that a state administrative determination had to be given preclusive effect under *Utah Construction* and *Elliott* even though it had not been judicially reviewed (the appellant had not taken advantage of his opportunity for state judicial review). We listed numerous factors in *Eilrich* that

showed that the state agency was "acting in a judicial capacity" and granted "adequate opportunity to litigate" without mentioning appealability. Likewise in *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), we upheld application of collateral estoppel in a section 1983 case to state administrative determinations, because we had to under *Utah Construction*, *Elliott*, and *Eilrich*. *See also Misischia v. Pirie*, 60 F.3d 626 (9th Cir. 1995), and *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986).

The case might be different were the state proceeding an arbitration under a collective bargaining agreement. *McDonald v. City of West Branch*, 466 U.S. 284 (1984), holds that "in a § 1983 action, a federal court should not afford res judicata or collateral estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement," *Id.* at 292, because the arbitrator might not have authority to enforce section 1983, and the arbitrator's expertise pertained to "the law of the shop, not the law of the land." *Id.* at 290. But those factors do not apply here. Though the proceeding resembled arbitration in its elective character, speed, and finality, it was not arbitration pursuant to a collective bargaining agreement. It was an administrative proceeding pursuant to court rules. The hearing officer was a state judge, with expertise in "the law of the land" as opposed to the "law of the shop," and was not restricted from enforcing the "law of the land."

The case might also be different if the state proceeding was mandatory rather than voluntary. We can leave for another day the question whether a state administrative agency to which a person had to submit his claim,

and from which there could be no judicial review, satisfies the "acting in a judicial capacity" and "adequate opportunity to litigate" requirements of *Utah Construction*. *Compare Crossroads Cogeneration v. Orange & Rockland Utilities, Inc.*, 1509 F.3d 129, 137 (3d Cir. 1998) (dictum that full and fair opportunity to litigate "includes the possibility of a chain of appellate review") with *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) ("due process does not require a State to provide an appellate system"). Whether a right to judicial review might be a prerequisite to "acting in a judicial capacity" and granting an "adequate opportunity to litigate" in some circumstances, it cannot be where a party voluntarily gives up his right to a proceeding subject to judicial review in order to take advantage of a proceeding that necessarily dispenses with judicial review as part of a scheme that affords a quick, cheap, and final remedy. There is no reason to deprive people of the option of quick, cheap final remedies by limiting finality to procedures where judges can review the determinations.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK J. WEHRLI Plaintiff, vs. COUNTY OF ORANGE et al. Defendants.	Case No. SACV 95-42 GLT (EEx) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Nov. 13, 1996)

Defendants' motion for summary judgment is GRANTED.

Under Fed. R. Civ. P. 56, the party moving for summary judgment has the burden of showing there are no genuine issues of material fact so that the party is entitled to judgment in its favor as a matter of law. Of course, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Moreover, "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa (Varig airlines) v. Walter Kiddle & Company, Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

COLLATERAL ESTOPPEL

A threshold issue in this motion for summary judgment is whether Plaintiff is precluded from relitigating

the issues in this action. Plaintiff filed this suit on January 19, 1995. The action was stayed due to Defendant County's bankruptcy filing of December 6, 1994. Plaintiff then sought an administrative hearing in December 1995, pursuant to the "Court Personnel Rules and Regulations – Marshal Unit" ("Rules").[1] The proceeding was presided over by a Municipal Court Judge and a decision unfavorable to Plaintiff was issued on January 5, 1996. After the bankruptcy stay was lifted, Plaintiff resumed prosecution of the present claims.

The Municipal Court Judge addressed the same issues in his decision that are now before the Court. First, Judge Mahler ruled "once a determination was made that Deputy Wehrli was no longer qualified to serve as a peace officer, the Marshal's Office had no obligation to locate another non-sworn position for Deputy Wehrli. In re Appeal of Mark J. Wehrli from Discharge as Deputy Marshal, at 2. "The fact that Marshal Carona kept Deputy Wehrli on in a light duty assignment . . . does not expand the rights of the employee. *Id.* Second, based on the medical information available to Marshal Carona, the Judge found Carona acted reasonably in discharging Plaintiff. *Id.*, at 3.

The doctrine of collateral estoppel bars "re-litigation of an issue that has been actually litigated and necessarily

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[1] The Rules were adopted by the Joint Marshal Personnel Committee (JMPC). California Government Code § 74011 empowers the JMPC to adopt rules for a personnel system for the employees of the Marshal's Department. The Plaintiff does not challenge the facial validity of either the Rules or Govt. Code § 74011.

decided." *Clements v. Airport Authority of Washoe County,* 69 F.3d 321, 330 (9th Cir. 1995). In discussing the preclusive effect of administrative hearings, the Supreme Court held:

> Such repose is justified on the sound and obvious principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise. To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution. The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency, be it state or federal, which acts in a judicial capacity.

Astoria Federal Savings and Loan Assoc. v. Solimino, 111 S.Ct. 2166, 2169 (1991). Plaintiff had the opportunity to litigate the issues of the present action in an administrative proceeding.[2] Thus the question becomes whether the defeat was "fairly suffered."

Plaintiff, who had already filed the present action in federal court, chose to pursue an administrative hearing in Municipal Court. "California courts accord collateral estoppel effect to municipal administrative hearings that

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[2] Plaintiff was represented by an attorney at the administrative proceeding and had the opportunity to be heard and to present evidence. The parties also had the opportunity to cross-examine opposing witnesses. Rules, Article IX(D). There was not, however, a transcript made of the proceedings.

have sufficient judicial safeguards." *Eilrich v. Remas*, 839 F.2d 630, 633 (9th Cir. 1988). Plaintiff argues there were not sufficient judicial safeguards because he did not have the opportunity to obtain meaningful review of the Municipal Court hearing decision. *See*, CAL. CODE PROC. § 1094.5 (review via a writ of mandate).

The California Court of Appeals held a writ of mandate pursuant to § 1094.5 was not available where plaintiff chose to pursue binding arbitration. *Zazueta v. County of San Benito*, 38 Cal. App. 4th 106, 110 (1995) ("the arbitrator's opinion shall be final and binding on both parties"). Here, the Rules governing the Municipal court hearing established a proceeding analogous to a binding arbitration. *See*, Rules, Article IX(D). Plaintiff voluntarily chose to pursue a binding administrative proceeding before a Municipal Court Judge, much like pursuing binding arbitration before a neutral third party. The Rules state "[t]he decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review." Rules, Article IX(D)(8). Thus, Plaintiff necessarily waived his right to pursue a writ of mandate when he chose the administrative hearing.

Plaintiff is also precluded from seeking a remedy under California Government Code § 3309.5, which allows officers to seek remedies in the courts. This right was waived when Plaintiff sought the binding administrative hearing. *See, Id.*, at 112-113.

Because Plaintiff is precluded from relitigating the issues of this action and has waived other legal remedies by seeking a binding administrative hearing, Defendants' motion for summary judgment will be GRANTED.

DISPOSITION

Because the Court holds Plaintiff is precluded from bringing the present claims, the Court does not reach the issues of equitable estoppel or the Defendants' immunity. Defendants' motion for summary judgment is GRANTED.

DATED: 11-12-96

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES
DISTRICT JUDGE

[SEAL]

COUNTY OF ORANGE

Municipal Court

HARBOR JUDICIAL DISTRICT
4601 JAMBOREE ROAD
NEWPORT, BEACH, CALIFORNIA 92660

GLENN A. MAHLER
JUDGE

TELEPHONE
(714) 476-4789

January 5, 1996

Ms. Deborah M. Gmeiner
Deputy County Counsel
10 Civic Center Plaza
POB 1379
Santa Ana, CA 92702-1379

Mr. Michael P. Stone
600 South Lake Avenue
Suite 401
Pasadena, CA 91106

IN RE APPEAL OF MARK J. WEHRLI FROM DISCHARGE AS DEPUTY MARSHAL

Dear Counsel:

The Court has had an opportunity to read and review the briefs submitted by counsel. The Court commends counsel for their preparation, conduct of the hearing and their research.

There are several issues that the Court wishes to address.

First, Counsel for Mark Wehrli argues that Marshal Carona was required to reduce Appellant to the position of Office Assistant without requiring him to waive his right to appeal the reduction.

Although testimony was presented at the hearing regarding the job offer, the court did not consider this to be a factor in addressing the issue of Deputy Wehrli's termination. Since County Counsel did not address this issue, the Court, after receiving Appellant's argument, requested County Counsel to brief this issue and permitted Appellant to respond.

It is the Court's opinion that the Court Rules and Regulations adopted by the Joint Marshal Personnel Committee apply only to POST certified employees. Therefore, any reduction of a POST certified employee can only occur within that same classification. It is apparent from the testimony that the position of Office Assistant is not a POST certified position but is instead a support or clerical position within the Marshal's Unit.

Marshal Carona testified upon receiving the recommendation from Dr. Lee that Deputy Wehrli not be assigned duties of a peace officer that he tried to find alternative employment for the Appellant. It is the Court's opinion that once a determination was made that Deputy Wehrli was no longer qualified to serve as a peace officer, the Marshal's Office had no obligation to locate another non-sworn position for Deputy Wehrli. The Marshal could have terminated Appellant and Deputy Wehrli would then have had his right to appeal.

The fact that Marshal Carona kept Deputy Wehrli on in a light duty assignment from April 1994 until December 13, 1994, while the Marshal and his staff tried to find an alternative position for an employee who had been well thought of by the department, does not expand the rights of the employee. [Champ v. Baltimore County

(1995) 884 F.Supp 991]. Nor does the fact that the position of Office Assistant was offered to Deputy Wehrli, conditioned on his "voluntarily" waiving his appeal rights, constitute a violation of any of Deputy Wehrli's rights. Deputy Wehrli had no right to be reduced to the position of Office Assistant. Therefore, the Marshal could condition this new job offer on whatever terms he saw fit. Deputy Wehrli could either accept or reject the offer. He chose to reject the offer and pursue his right to appeal.

The second issue is that as set forth by County Counsel. Pursuant to Article IX Section 7.C.1c, "Was Mark Wehrli discharged for reasonable cause?"

There is no issue that Deputy Wehrli suffers from a seizure disorder. It is also not disputed that, but for the seizure disorder coupled with the recommendation of Dr. Lee that Deputy Wehrli should not work in the capacity of a peace officer until five years after his initial seizure, Appellant would not have been terminated.

The basis for Deputy Wehrli's termination is contained in the letter of August 5, 1994, from Dr. Lee to Captain Don Spears. In addition to the letter, Dr. Lee attached two tables from the POST Standards for the Marshal's review.

It is evident from the testimony that Marshal Carona relief upon Dr. Lee's recommendation. Marshal Carona testified that he did not review the POST Training Manual Except for the pages which Dr. Lee attached. He further testified that he did not consult any physician other than Dr. Lee. Marshal Carona stated that he spoke with Dr. Lee and was "comfortable" with how Dr. Lee arrived at the risk of seizure recurrence. Marshal Carona

testified that 60% recurrence of a seizure within the first year was the most compelling data. This information was contained in Table IX-3 attached to Dr. Lee's letter of August 5, 1994.

Marshal Carona and his staff clearly had a right to rely on Dr. Lee's expertise. She was the Medical Program Director for Employee Service for Orange County.

However, the Court was less than impressed by Dr. Lee's investigation into Deputy Wehrli's disability in regards to the computation of risk set forth in the POST Standards. Dr. Lee's efforts consisted mainly of reviewing the reports of Dr. Graham, Appellant's doctor, and briefly speaking with him; speaking with Dr. Robert Goldberg, who helped author the POST Standards on neurology, to verify that the POST Standards were still current; and a review of the POST Standards. Additionally, the information in Dr. Graham's report of "Family History of seizures in maternal cousin. Full details unclear." was incorrect. It should be noted that it appears that until this matter came for hearing neither Appellant nor anyone on his behalf attempted to correct Dr. Graham's report of 04/06/94 or advise Dr. Lee of this error.

Additionally, Marshal Carona, in part, based his decision on Table IX-3, which is not adjusted for compliance with medication, since this was the only information provided to the Marshal. The parties have stipulated to the introduction into evidence of an adjustment to Table IX-3 reflecting compliance with medication. Significantly, the risk of seizure drops from 12% to 14% for non-compliance to 4.8% to 5.6% with compliance after remaining seizure free for one year. Again, it is important to

note that it appears that prior to this hearing there was no effort by Appellant to present this information to either Dr. Lee or Marshal Carona. Significantly, at the time of termination, Deputy Wehrli was three months away from falling into this corrected risk level.

Whether or not any of the new information that came out at the hearing would have changed Marshal Carona's decision to terminate Deputy Wehrli is unknown since no inquiry was made by counsel. The Court finds that Marshal Carona acted reasonably in relying upon the information provided to him by Dr. Lee even though Dr. Lee could have provided a more thorough investigation.

Finally, the Court must determine whether, based upon Appellant's disabilities, Appellant is able to perform the essential functions of a Deputy Marshal.

Where as a result of a disability, an employee poses a direct threat to the health or safety of himself/herself or others, that person may be terminated. [Champ v. Baltimore County (1995) 884 F.Supp. 991]. It is obvious to this Court that there are certain duties that Appellant can no longer perform, such as bailiff functions in a criminal courtroom and serving criminal arrest warrants.

However, it is equally evident that there are currently positions within the marshal's department that pose no significant risk to Deputy Wehrli or to others. It is clear to the Court that the "jailers" positions that exist in Central/Superior Court, Harbor Court, North Court and West Court can accommodate Deputy Wehrli. As long as POST certified personnel are being used in these jail positions, Deputy Wehrli can fulfill these functions even with the

potential of another seizure. As indicated by the testimony, all these positions are separated from prisoners and the jailers are in locked control modules.

The Court also believes that the risk of future seizures, although possible, is insignificant provided that Deputy Wehrli remains compliant with his prescribed medication.

Deputy Wehrli, under oath, testified that he was willing to have the Marshal's Office monitor the taking of his medication. Additionally, Deputy Wehrli testified that he is also willing to take periodic unannounced blood tests to monitor his dilantin levels.

The Court finds that if the Marshal's Office monitors Deputy Wehrli's taking of his medication as well as conducting or having Deputy Wehrli submit to blood tests of his dilantin levels, the recurrence of seizures while acting as a jailer would be insignificant, provided that Appellant is able to maintain his dilantin levels within the normal range that is medically accepted.

The final issue to be determined is as to pay and fringe benefits, if any, Deputy Wehrli is entitled to.

The Court finds that Deputy Wehrli was aware of Dr. Lee's letter of August 5, 1994, and from August until December 13, 1994, Appellant made no effort to correct the information contained in Dr. Graham's report (previously mentioned) nor was Marshal Carona or Dr. Lee provided any subsequent medical reports nor does it appear any additional medical/neurological exams were conducted after Dr. Lee's letter. (The Court has reviewed Exhibits 24, 25, 26, 30, 31, and 32.) Further, a review of the

medical records submitted by Appellant to Dr. Lee, Exhibits 25 and 26, indicates that Appellant was not within normal range for dilantin. (Appellant was 8.9 on March 31, 1994; and was 6.8 on July 28, 1994; Normal range is 10.0-20.0.) Apparently no subsequent test results were submitted. Dr. Lee testified these results raised her concern that the seizures were not under control by medication. Dr. Lee testified that either the doctor did not prescribe an adequate dosage or Deputy Wehrli was not taking the medication regularly, or both. The Court finds that Deputy Wehrli's inaction in providing information to Dr. Lee and Marshal Carona was a substantial factor leading to his termination.

Therefore, pursuant to the Joint Marshal's Personnel Committee Court Personnel Rules and Regulations, Article IX Section 7.C.2.c.1, the Court finds that the order of discharge should be modified, the Appellant shall be restored to a position in his former class subject to forfeiture of pay and fringe benefits for all of the period of time the Appellant was removed from duty.

Sincerely,

/s/ Glenn A. Mahler
GLENN A. MAHLER
Judge

cc: Marshal Carona

INITIALS le HN PC SH MX CAC CC PK TC OTHER ___

(LOGO)
MILIKIN MEDICAL CENTERS

DATE/VISIT MAR 24 1994 Male ✓ Female _

110/80 T 98 P 72 R 20 WT 188 HT 6'0 AGE 30

ALLEGIES NONE KNOWN

Chief c/o F/U La Palma E.R.

Seizure last night and no history of seizure disorder

ICDA CODE _____

MEDICAL HX _____ 780.3

_____ LNMP N/A DLPS N/A

WEHRLI			MARK
006780135643	67	MR#	000000173684
5.0V/20.MH.25.ER			FC: 9
9091 HOLDER #23			09-05-1963
CYPRESS	CA		90630
714-821-4305	WK#		714-896-7194
CALIFORNIA CARE			67203349

03-24-94 16:00 10363 BV
CYPRESS FP/GP
R. HICKS, MD
Physician _____

VISIT WORK RELATED __ YES __ NO

PROBLEM
LIST
Updated _____
Initials

RUSTAN H. HICKS M.D.
General Practice
Physician's Stamp

/s/ N. Douglas MD
Nurses Signature/Title

CURRENT MEDICATIONS

[Best interpretation of Doctor's handwritten diagnosis]

Patient has had a seizure. He was treated at La Palma Hosp. & started on Dilantin 100 mg tid. He will be referred to Dr. Graham for further evaluation as needed. Continue Dilantin.

Ref to Neurology.

/s/ Rustan H. Hicks, M.D.

FINAL REPORT

DELE HIESHIMA, M.D.
LABORATORY CO DIRECTOR

STEVEN BLEIWEISS, M.D.
LABORATORY CO DIRECTOR

--- CHEMISTRY ---
- DRUG ASSAY -

TEST	NORMAL RANGE	UNITS	03/31/94 12:18
DILANTIN	10.0-20.0	MCG/ML	8.9 L (1)

[Bottom Of Page Illegible]

FINAL REPORT

ADELE HIESHIMA, M.D.
LABORATORY CO DIRECTOR

STEVEN BLEIWEISS, M.D.
LABORATORY CO DIRECTOR

--- CHEMISTRY ---
-- DRUG ASSAY --

TEST	NORMAL RANGE	UNITS	07/28/94 08:28 Graham, RIC
DILANTIN	10.0-20.0	MCG/ML	6.8 L (1)

KEY *ABNORMAL RESULT
=*= RESULT FOOTNOTE PND:PENDING
H:HIGH L:LOW (#): PERFORMING LAB

MULLIKIN MEDICAL CENTERS
PIONEER HOSPITAL
17831 S PIONEER BLVD
ARTESIA, CA 90701

LABORATORY
SINGLE REPORT

FACILITY: MILLIKIN MEDICAL CENTER
PATIENT NAME: WEHRLI, MARK
MED REC NO: 67173684
ATTENDING DOCTOR: GRAHAM, RICHARD MD
ACCOUNT NUMBER: C000067203349

SEX:M AGE:30Y
LOC: ROSE 1 1

TEL: 714-631-3220
CHB: 67

COPY-DOCTOR INFORMATION COPY

AUG 02 1994

MULLIKIN MEDICAL CENTER PROGRESS REPORT (2)

PATIENT NAME: WORLEY WEHRLI, MARK #26
ACCOUNT NUMBER: 67173684

DICTATION FOR OFFICE VISIT OF JULY 21, 1994 BY DR. RICHARD GRAHAM:

DICTATION BY DR. RICHARD GRAHAM:

ELECTROENCEPHALOGRAM REPORT

AGE OF THE PATIENT: 30

This is an eight channel EEG done on a 30 year-old male in the awake and drowse states. Recording shows bilaterally symmetric moderate amplitude, posterior dominant 10 hertz activity which is reactive to arousal procedures. During drowse, there is intermixed theta slowing without focality. There are no remarkable epileptiform features noted throughout the period of recording. Hyperventilation did not induce appreciable abnormalities.

IMPRESSION:

(1) NORMAL EEG'S IN THE AWAKE AND DROWSE STATES.

RECOMMENDATIONS: Clinical correlation necessary.
DD: 07/21/94 DT: 07/25/94 RICHARD GRAHAM, M.D./sg

MULLIKIN MEDICAL CENTER
A Medical Group, Inc.
Radiology Reports

PATIENT NAME_____I.D.#_____

4th Report Mounted Here

3rd Report Mounted Here

CHART COPY

PIONEER HOSPITAL
MULLIKIN MEDICAL CENTERS

[Additional Centers Omitted In Printing]

RADIOLOGICAL CONSULTATION

Name: Wehrli, Mark DOB: 09/05/1963
Attending Physician: Graham, Richard M.D.

MRN: d67173684
Location:
Dept.: cat cl

Date: 04/06/1994 Case Number: 0067203349
Clinical Summary: sizure [sic]

DD: 4/7/94

DT: 4/7/94

BMS: mc

CT – BRAIN SCAN (WITH NON-IONIC CONTRAST):

Computed axial tomographic views were made at 4 millimeter intervals in the posterior fossa and 8 millimeter interval to the vertex, prior to and following non-ionic contrast injection. The cisterns and ventricles are normal in size and no shift of midline structures is identified. No

focal lesions within the mid brain or cerebral hemisphere are demonstrated.

CONCLUSION: Normal study.

Bruce M. Schwartz, M.D.

MULLIKIN MEDICAL CENTER

PROGRESS REPORT (2)

PATIENT NAME: WEHRILI [sic], MARK

ACCOUNT NUMBER: 8973684

DICTATION FOR OFFICE VISIT OF MARCH 31, 1994 BY DR. RICHARD GRAHAM:

SUBJECTIVE: This patient is a 30-year-old right-handed white male. Benign medical history. Had an episode of syncope versus seizure in October. CT head, negative at that time and not placed on medication. Had recurrent event which was witnessed as a seizure, one week ago. Placed on Dilantin at that time.

Family History of seizures in maternal cousins. Full details unclear.

No history of head injury. No drug use, etc.

He has been under increased stressors with each event in October in this month. No remarkable adverse affects [sic] of the Dilantin.

PHYSICAL EXAMINATION: HEENT: Skull is atraumatic. Fundi are normal. No papilledema, venous distention, or hemorrhage. Neck is supple. No meningismus.

NEUROLOGICAL EXAMINATION: Mental State: The patient is awake and alert and oriented. Language is fluent. Memory is intact. No neglect. Cranial nerve II, intact fields by confrontation. No afferent pupillary defect. Cranial nerve III, IV and VI, extraocular movements are conjugate and full. No ptosis, anisocoria or nystagmus. Cramial nerve V is normal. Cranial nerve VII is normal. Cranial nerve VIII is nonlateralizing Rinne and Weber. Cranial nerves IX through XII are midline and symmetric. Sensory examination: Normal throughout to all modalities. Motor examination is 5/5, strength. Normal tone and normal bulk. No pronator drift. Reflexes are 1-2+. Plantars are flexor. No clonus, Hoffman's, frontal release or Babinski's. Cerebellar examination is normal. Gait testing is normal.

INPRESSION:

(1) GENETIC EPILEPSY, UNTIL PROVEN OTHERWISE.

PLAN: Will obtain CT head with contrast. Continue Dilantin 100 mg. t.i.d. or 300 mg. q.h.s. Dilantin level to be obtained. The patient is advised not to drive until contacted by DMV. DMV notification was performed through the Emergency Room by report. Clinical follow-up. Would maintain therapy for at least two years at this point. EEG can be obtained at that time to further assist in duration of therapy.

DD: 03/31/94 DT: 04/06/94

RICHARD GRAHAM, M.D./sg

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK J. WEHRLI PLAINTIFF(S) VS. COUNTY OF ORANGE, et al DEFENDANT(S)	CASE NUMBER SA CV-95-42 LHM (EEx) SUMMONS (Filed Jan. 26, 1995)

TO THE ABOVE-NAMED DEFENDANT(S), You are hereby summoned and required to file with this court and serve upon MARK J. WEHRLI

Plaintiff's attorney, whose address is:

MICHAEL P. STONE, Esq.
STONE & FEELEY, P.C.
700 SOUTH FLOWER STREET,
FOURTH FLOOR
LOS ANGELES, CA 90017
(213) 236-9670

an answer to the complaint which is herewith served upon you within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DATE: January 19, 1995

CLERK, U.S. DISTRICT COURT

By /s/ F. Galvan
Deputy Clerk

(SEAL OF THE COURT)

MICHAEL P. STONE, (State Bar No. 91142)
MUNA BUSAILAH, (State Bar No. 166328)
STONE & FEELEY, P.C.
700 South Flower Street, Fourth Floor
Los Angeles, California 90017
(213) 236-9670

Attorneys for Plaintiff,
MARK J. WEHRLI

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARK J. WEHRLI Plaintiff, v. COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal; and DOES 1 through 100, inclusive, Defendants	) CASE NO. SA CV 95-42 LHM (EEx)) VERIFIED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATION OF CIVIL RIGHTS WITH SUPPLEMENTAL CLAIMS; AND EXHIBITS 1 THROUGH 15; DEMAND FOR JURY TRIAL [*42 USC § 1983, 1988; F.R.Civ.P. Rules 57 and 65; C.D. Cal.Rule 7.17*] (Filed Jan. 19, 1999)

ALLEGATIONS COMMON TO ALL CLAIMS

I

PREFATORY

1. This is an action for damages and injunctive relief by Mark J. Wehrli, against his former employers for violation of his civil rights in connection with his discharge from employment as a Deputy Marshal. Supplemental state law claims are also presented.

II

JURISDICTION AND VENUE

2. Federal jurisdiction is conferred by *28 USC §§ 1331* (federal question) and *1343[3]* (civil rights). Supplemental jurisdiction over the state law claims is conferred by *28 USC §1367*. Initial jurisdiction of the state law claims in the superior court is conferred by *Government Code §3309.5*. Venue is proper in the Central District of California ("C.D. Cal."), Santa Ana Branch, ("S.A."), in that the wrongs alleged herein occurred at 909 N. Main Street, Santa Ana, California 92701.

III

PARTIES

3. Plaintiff Mark J. Wehrli ("Wehrli") was at all relevant times, a regularly employed Deputy Marshal of the County of Orange. Wehrli held this position as a vested and substantial property right, and could be lawfully removed from his position only with cause, pursuant to Article 8, Section 6, A. of the "Court Personnel Rules and

Regulations, Marshal Unit, Superior and Municipal Courts" ("Rules"). Said section provides:

> No regular or limited-term regular employee shall be discharged except for reasonable cause. (*Exhibit "1" hereto.*)

4. Defendant County of Orange ("County") was at all relevant times, and now is, a duly constituted, organized and operating county government within the State of California. County was Wehrli's employer for a period of approximately six (6) years, until it unlawfully discharged him from employment in violation of his federal and state constitutional rights and in violation of his procedural rights under *California Government Code §3303, 3304 (b) and 3309.5.*

5. Defendant Michael S. Carona ("Carona") was at all relevant times, and now is, the Orange County Marshal. Carona, as Marshal, is the department head and official of County, vested with final policy-making authority in personnel actions such as the one at issue in this complaint. (*See: Rules, Article VIII, §1 – Exhibit "2".*) Carona discharged Wehrli from his employment on or about December 23, 1994 (*Exhibit "3"*). Carona is sued in both his individual and official policy-making capacities.

6. Defendant Don Spears ("Spears") was at all relevant times, and now is, a Captain of the Orange County Marshal. Spears, as Captain, is an executive-level official of County, vested with policy-making authority in personnel actions such as the one at issue in this complaint. Spears, along with Carona, discharged Wehrli from his employment on or about December 23, 1994 (*Exhibit "3"*).

Spears is sued both in his individual and official policy-making capacities.

7. Defendants, DOES 1 through 100, ("DOES") inclusive, are not known or identified at this time. On information and belief, Wehrli alleges that each DOE is in some manner responsible for the wrongs alleged herein, in that each such defendant advised, encouraged, participated in, ratified, directed or conspired to do, the wrongful acts alleged herein. When the true names and capacities of said defendants become known, Wehrli will seek leave to amend this complaint to show their true identities in place of their fictitious names as DOES 1 through 100.

8. Defendants, and each of them, planned, agreed and conspired to do the wrongful acts alleged herein, and each defendant was the agent, employee and servant of every other defendant. Defendants acted in the course and scope of said agency, service and employment at all relevant times.

IV

FACTS COMMON TO ALL COUNTS

9. Wehrli has been employed as a regularly employed Deputy Marshal of the County for six (6) years, serving as a "bailiff" in the Municipal Courts, assigned to Municipal Court Judge Robert H. Gallivan of the West Orange County Judicial District. Wehrli has served the court as bailiff in an "outstanding" manner according to Judge Gallivan. (*Exhibit "4".*)

10. Wehrli has performed his duties in a highly competent manner in the opinion of Carona and Spears. Wehrli's performance evaluations over his career have been superior.

11. In March 1994, Wehrli, while off-duty suffered some type of seizure of undetermined origin. This was the second episode; the first occurring off-duty in October 1993. He notified his employer after the second incident.

12. He was placed on "light-duty" restrictions by the County physician, Dr. Loretta Lee, M.D. on April 7, 1994 (*Exhibit "5"*). This meant Wehrli was restricted from driving County cars, and from performing "peace officer" duties. He retained the salary and benefits of his position, and performed functions inside the Central District courthouse.

13. Wehrli has been treated since the second episode by Dr. Richard Graham, M.D., a neurologist. He was started on Dilantin, and has had no further difficulties. Pursuant to state law, Dr. Graham reported Wehrli's circumstances to the Department of Motor Vehicles, Division of Driver's Licenses. After reviewing Wehrli's circumstances and the medical evidence, the DMV has not limited Wehrli's unrestricted driver's license (*Exhibit "6"*).

14. Dr. Lee continued to review Wehrli's case and reported to defendants that persons such as Wehrli bear a risk of recurrence for a period of five years from the last episode, declining each episode-free year to an insignificant risk in the fifth year (*Exhibit "7"*).

15. Defendants informed Wehrli that he would be disallowed from performing peace officer duties and from driving County vehicles for five years; further, that the Marshal "has no light duty positions" and that consequently, Wehrli would not be permitted to retain his position. Defendants agreed to look for positions elsewhere in County employment for Wehrli as an "accommodation" of his physical handicap or disability.

16. Defendants notified Wehrli that a position of "Office Assistant" had been identified for him within the Marshal's office. This position's duties are clerical in nature, offering Wehrli less than one-half of the value of his benefits and salary as a Deputy Marshal, and with no career advancement possibilities. Wehrli would also surrender his peace officer position, salary, benefits and retirement.

17. The Rules provide that no member may be discharged or reduced to a lower classification except for reasonable cause (*See: Rules, Article VIII, §5 and 6 – Exhibit "8".*)

18. The Rules provide that any member so discharged or reduced is entitled to a full-blown appeal hearing before a judge of the municipal or superior court. (*See: Rules, Article VIII, §7 – Exhibit "9".*)

19. Wehrli was notified by Spears that he could request a "voluntary" reduction to Office Assistant with *no reemployment rights* as a Deputy Marshal by signing a form provided, in lieu of discharge for physical disability (*Exhibit "10"*).

20. In a series of communications with undersigned counsel, defendants agreed that the *sole* reason for Wehrli's removal from his position is his perceived physical handicap (*Exhibit "11"*).

21. There is an existing dispute between Wehrli and his physician on one side, and defendants and Dr. Lee on the other, on the question of whether Wehrli's perceived disability is in fact disqualifying, constituting the "reasonable cause" required by the Rules, to reduce or discharge him. Dr. Graham believes Wehrli can be safely returned to full duty (*Exhibit "12"*).

22. Wehrli accepted the Office Assistant position, but Spears and Carona told him he could have the position *only* if he agreed (1) to waive his due process rights to appeal the reduction under the Rules, XIII, §7, and (2) to waive any reemployment rights to his position, even though the perceived period of disability passes without incident.

23. Employment in the Office Assistant position was expressly made contingent by defendants upon Wehrli's relinquishment of his due process rights to challenge the medical determination which motivated his removal, and the abandonment of any hope of reemployment in the position of Deputy Marshal, regardless of his fitness for duty.

24. Counsel undersigned warned defendants that they could not lawfully condition Wehrli's continued public employment upon a waiver of his constitutional and due process rights, during the so-called *Skelly* process, after defendants served Wehrli with a notice of intent to discharge (*Exhibit "11", "13" and "14"*).

25. Notwithstanding unequivocal notice that they were violating Wehrli's rights in the manner described above, defendants discharged Wehrli outright on December 23, 1994 (*Exhibit "15"*) and he remains unemployed. Defendants expressly refused to permit Wehrli to continue County employment unless he waived any claim to his Deputy Marshal position, salary, benefits and retirement.

26. Defendants have exacted a price from Wehrli, for exercise of his rights to due process on the question of his removal from his Deputy Marshal. That price was immediate discharge from County employment.

27. Having paid the price, Wehrli is pursuing appeal of his removal as Deputy Marshal under the Rules, although he is unemployed for what may be a protracted administrative procedure, involving complex medical issues. That appeal is necessarily limited to the "reasonable cause" or lack thereof, for the removal of Wehrli from his Deputy Marshal position.

28. As a consequence of his discharge, and of the unlawful conditioning of his continued employment upon waiver of due process guarantees, Wehrli has suffered monetary losses, including salary, medical insurance, other benefits of employment, and loss of his retirement, with attendant economic and personal hardships. He has suffered physical and emotional injury and damage, all in an amount to be proven at trial.

29. The individual defendants acted with final policy-making authority in doing these things, subjecting the County to liability, along with the individual defendants.

30. In doing these things, defendants violated clearly established rights of which a reasonable law enforcement official should have known; that is, in light of decades of pre-existing law that continued public employment may not be conditioned upon a waiver of constitutional rights, the unlawfulness of their acts was, and is apparent.

V

COUNT ONE

(Damages For Violation Of Civil Rights – *42 USC §1983*)

31. In doing the things described herein, defendants violated Wehrli's rights under the due process clauses of the 5th and 14th Amendments, entitling Wehrli to a damages remedy under *42 USC §1983*. Wehrli seeks compensatory damages for all injurious consequences flowing from the violations of his rights in an amount to be proven at trial.

VI

COUNT TWO

(Injunctive Relief – *42 USC §1983, F.R.Civ.P. Rule 65*)

32. Wehrli continues to suffer the injurious consequences of his unlawful separation from employment. But for defendants' unlawful attempt to coerce Wehrli into a surrender of his due process rights to avoid outright discharge, Wehrli would not have been discharged, and would still be retained in County employment. Wehrli has no plain, speedy nor adequate remedy at law

to compel defendants to reinstate him to County employment. Wehrli continues to be irreparably damaged because he is unemployed, and injury increases day by day. By the facts alleged herein, Wehrli has demonstrated that there is a substantial, if not certain likelihood that he will prevail on the merits. Defendants can demonstrate no prejudice if they are compelled to reinstate Wehrli to County employment while he pursues his due process appeal of the involuntary reduction, since continued employment was conditionally offered to him in the first place. Wehrli seeks injunctive relief to command defendants to reinstate him to his position as a Deputy Marshal, with back-pay, benefits and interest thereon, and to continue him in that status until the propriety of the reduction is resolved as required by the Rules. Wehrli will seek this relief by way of noticed motion under the local rules.

VII

COUNT THREE

(Declaratory Relief – *F.R.Civ.P. Rule 57*)

33. An actual and bonafide controversy exists in this matter, in that defendants claim they may lawfully do the things alleged herein pursuant to the Rules, and other regulations of the County. Wehrli claims that these actions violated the Rules and County procedures. A judicial declaration is therefore requested, determining the rights and duties of the parties, within the circumstances of this case.

VIII

COUNT FOUR

(Supplemental Claim – *California Constitution Article I, §7*)

34. The actions of defendants described herein violate the due process protections of the California Constitution Article I, §7. Wehrli seeks damages and injunctive relief pursuant to *California Code of Civil Procedure §527, et seq.* as a consequence thereof.

35. With respect to Count Four hereof, Wehrli is presently presenting a claim for damages pursuant to *§915* of the *California Government Code,* but was unable to present the claim and have it acted upon by the County prior to instituting this suit of injunctive relief, given the emergent nature of this claim.

IX

COUNT FIVE

(Supplemental Claim – *Government Code §3309.5*)

36. The actions of defendants described herein violate the due process protections of the *Public Safety Officers' Procedural Bill of Rights Act, Government Code §§3303, 3304(b) and 3309.5.* Pursuant to *§3309.5* injunctive and extraordinary relief is authorized to remedy the violation, including reinstatement and back-pay.

X

PRAYER

WHEREFORE, Wehrli prays for relief as follows:

1. For compensatory damages according to proof with interest thereon;

2. For reinstatement and back-pay with interest thereon by way of injunction upon noticed motion therefor;

3. For attorney's fees under *42 USC §1988* and *Code of Civil Procedure §1021.5* at the prevailing market rate;

4. For costs of suit;

5. For other appropriate relief.

Dated this 14 day of January, 1995.

STONE & FEELEY, P.C.

/s/ Michael P. Stone
MICHAEL P. STONE,
Attorney for Plaintiff
MARK J. WEHRLI

DEMAND FOR JURY

Wehrli hereby demands a jury trial pursuant to *F.R.Civ. Procedure Rule 38.*

Dated this 14th day of January, 1995.

STONE & FEELEY, P.C.

/s/ Michael P. Stone
MICHAEL P. STONE,
Attorney for Plaintiff
MARK J. WEHRLI

EXHIBIT 1

[M-40] C. In accordance with the provisions of Article IX, an appeal of reduction for reasons of unsatisfactory performance or physical disability shall be initiated at Step 3 of the grievance/Appeal procedure, except for Reductions imposed by the Joint Marshal's Personnel Committee, which may be referred directly to a hearing before the Judge.

Section 6. *Discharge and Right of Appeal*

➜ A. No regular or limited-term regular employee shall be discharged except for reasonable cause.

[He IS appealing!?]

B. A written notice of such discharge stating specifically the cause of the discharge shall be given to the employee.

C. In accordance with the provisions of Article IX, a discharge may be appealed directly to Step 4 of the grievance/appeal procedure. An appeal of discharge to Step 4 shall be presented in writing to the Marshal within ten (10) calendar days from the date the discharge was effective.

Section 7. *Polygraph Examination*

No employee shall be compelled to submit to a polygraph examination. No disciplinary action whatsoever shall be taken against an employee refusing to submit to a polygraph examination; nor shall any comment be anywhere recorded indicating that an employee offered to take, took or refused to take a polygraph examination unless otherwise agreed to in writing by the parties; nor shall any testimony regarding the results of a polygraph examination or evidence of any kind regarding an employee's offer to take or refusal to take a polygraph examination be admissible in any proceeding pursuant to the Court Rules and Regulations, unless otherwise agreed to in writing by the parties.

EXHIBIT 2

[M-38] ARTICLE VIII

DISCIPLINARY ACTION

Section 1. *Authority*

➜ The Judges of the Courts specifically find that the discipline and/or discharge of Department

employees shall be determined and imposed, when necessary, by the Marshal.

Section 2. *Reprimand and Substandard Performance Evaluation*

A. No regular, limited-term or probationary employee shall receive a written reprimand or a substandard performance evaluation except for reasonable cause.

B. A written reprimand or substandard performance evaluation (i.e., a score of less than 300 points) given to a regular, limited-term or probationary employee may be appealed through the grievance/appeal procedure. Such appeal shall be initiated at Step 1 of the grievance/appeal procedure.

Section 3. *Disciplinary Hearing for Suspension, Reduction or Discharge*

A. In suspending a regular, limited-term or probationary employee for more than five (5) days or in reducing a regular, limited-term or probationary employee for reasons of unsatisfactory performance or physical disability, or in discharging a regular or limited-term regular employee, a written notice of such proposed disciplinary actions shall be served on the employee personally, or by certified mail, at least ten (10) calendar days prior to the effective date of the proposed action. Such written notice shall contain:

1. a description of the proposed action and its effective date(s);

2. a statement of the reasons for such proposed action, including the acts or omissions on which the proposed action is based;

3. copies of material on which the proposed action is based;

4. a statement of the employee's right to respond, either orally or in writing, prior to the effective date of such proposed action;

5. a statement of the employee's right to representation;

6. a statement of the employee's right to appeal should such proposed action become final.

EXHIBIT 3

LOGO **ORANGE COUNTY MARSHAL**

909 North Main Street, Suite 2,
Santa Ana, California 92701
(714) 569-3771

MICHAEL S. CARONA
MARSHAL

December 23, 1994

Mark Wehrli
11971 Blackmer St.
Garden Grove, CA 92645

RE: NOTICE OF DISCHARGE

Deputy Wehrli:

By letter dated December 13, 1994 and given to you on December 13, 1994 you were advised of the department's intent to discharge you from your employment as an Orange County Deputy Marshal effective at 5:00 p.m. on December 23, 1994. You were afforded the opportunity to respond to the proposed discharge either orally or in

writing. By letter dated December 20, 1994 and received by FAX on December 22, 1994, you responded to the proposed discharge through your attorney, Michael Stone. The information presented in Mr. Stone's letter has been considered.

You are hereby notified that you will be discharged from your employment with the Orange County Marshal's Department at 5:00 p.m. on December 23, 1994. Your discharge is based upon the following:

> Your medical restrictions prevent you from performing the essential duties of a peace officer.

On or about March 23, 1994, you reported a newly diagnosed seizure disorder which was witnessed. Based upon medical restrictions placed upon you by Dr. Loretta Lee, M.D. of Employee Health Services, you have been in a limited duty capacity since April 7, 1994 pending further evaluation of your medical records. After further medical evaluation by Dr. Lee, she recommends in her memorandum dated August 5, 1994 that because of your diagnosed seizure disorders you should not work in the capacity of a peace officer for a period of five years after your initial seizure, provided those five years are seizure free. Dr. Lee's recommendation is based upon Peace Officer Standards and Training (P.O.S.T.) medical standards.

Subsequent to August 5, 1994 and continuing until the week of December 5, 1994, as a reasonable accommodation to your medical condition, a job search was conducted of other County of Orange jobs. Additionally, on

December 9, 1994 you were specifically offered the position of Office Assistant with the Orange County Marshal's Department. You have refused the job offer of Office Assistant.

Written materials upon which this discharge is based were provided to you with the Notice of Intent to Discharge dated December 13, 1994 (Enclosed). You have the right to initiate an appeal in accordance with Article VIII, Section 6.C of the Court Personnel Rules and Regulations, Marshal Unit.

/s/ Michael S. Carona
Michael S. Carona
Marshal

cc: Command Staff
Personnel File

Enclosure: Articles VIII and IX of the Court Personnel Rules and Regulations, Marshal Unit Notice of Intent to Discharge Dated March 3, 1992

EXHIBIT 4

Municipal Court
West Orange County Judicial District

8141 13TH STREET
WESTMINSTER, CALIFORNIA 92683-4593

TELEPHONE (714) 896-7173

Judicial District

Chambers of
ROBERT H. GALLIVAN
Judge

Cypress, Fountain Valley,
Garden Grove,
Huntington Beach
Los Alamitos, Seal Beach,
Stanton, Westminster

August 9, 1990

Lieutenant Larry Johnston
West Orange County Municipal Court
8141 13th Street
Westminster, CA 92683

Re: Deputy Marshal Mark Wehrli

Dear Lieutenant Johnston:

In January of this year I was appointed by Governor Deukmejian to serve as a judge in this court.

Your office assigned Deputy Marshal Mark Wehrli to me as my bailiff.

I am of the opinion that the bailiff is one of the primary elements in maintaining a smooth running courtroom.

Deputy Wehrli has been outstanding. He is courteous to the public and counsel appearing in my courtroom at all times.

His interaction with the clerk, juries, witnesses, and counsel during trials is always extremely professional.

Deputy Wehrli has a real ability to provide courtesy service to the public and court and also maintain that certain decorum that lets you know he is there to protect in the event of an emergency. I have great confidence in him and wish to thank you for assigning him to my courtroom.

Sincerely,

/s/ Robert H. Gallivan
Robert H. Gallivan
Judge

RHG:mm

EXHIBIT 5

EMPLOYEE HEALTH SERVICES
WORK RESTRICTION NOTICE –
MEDICAL CLASSIFICATION "C"

Department Marshal Date 4-7-94

Regarding Mark Wehrli Position Title Dep. I

The above _ Applicant X Employee SS# 571-53-5726

_ with an alleged work related injury/illness
_ with a non-work related condition
X undetermined date of injury _____

MAY WORK WITH THE FOLLOWING LIMITATIONS:

_ LIMITATION 1 – NO LIFTING OR CARRYING, PULLING OR PUSHING MORE THAN _____ LBS.

_ LIMITATION 2 – NO REPEATED BENDING, STOOPING OR TWISTING.

_ LIMITATION 3 – NO REPETITIVE CLIMBING, SQUATTING, KNEELING OR TWISTING.

_ LIMITATION 4 – LIMIT STANDING OR WALKING TO _____ PER HOUR/AT A TIME; BENCH OR DESK WORK PREFERRED.

_ LIMITATION 5 – LIMIT SITTING TO _____ PER HOUR/AT A TIME. CHANGE POSITION PERIODICALLY.

_ LIMITATION 6 – NO REPETITIVE ACTIVITIES OF THE _____ HAND, ELBOW, SHOULDER.

X LIMITATION 7 – NO DRIVING OF COUNTY VEHICLES OF ANY KIND, OR DRIVING PRIVATE VEHICLE ON COUNTY BUSINESS.

_ LIMITATION 8 – NO ALTERCATION/RESTRAINT ACTIVITIES.

_ LIMITATION 9 – NO WORKING WITH _____ ARM ABOVE SHOULD ER LEVEL.

_ LIMITATION 10 – NO WORKING ON LADDERS, SCAFFOLDING OR IN OTHER HIGH PLACES.

_ LIMITATION 11 – NOT PERMITTED TO OPERATE HEAVY EQUIPMENT/POWER MACHINERY.

_ LIMITATION 12 – ATTEND PHYSICAL THERAPY _____ TIMES PER WEEK.

X LIMITATION 13 – OTHERS: Recommend not to work alone in the capacity of a peace officer. Send results of tests to Employee Health Services. To replace release dated 4-6-94.

RESTRICTIONS APPLY UNTIL:

_ 7-13-94 (DATE)

_ CHANGED OR RELEASED BY TREATING PHYSICIAN.

_ RE-EVALUATION AT EMPLOYEE HEALTH ON 7-13-94.

_ PERMANENT

/s/ Illegible
Signature of Physician/~~Nurse~~

RETURN TO WORK
EMPLOYEE NOTIFICATION OF
MEDICAL RESTRICTION

I the undersigned, have been advised by County of Orange Employee Health Services, that a medical restriction has been placed on my activities while performing any duties within the scope of my employment with the County of Orange. I have read and understand the medical restriction to refrain from specific duties as detailed above. I further understand that it is my responsibility not to violate this restriction without specific authorization from County of Orange Employee Health Services. I further understand that if County supervision requires

that I perform duties that would violate this restriction, I will immediately advise my supervisor and other County management if necessary, of my restriction before performing the requested duties. I understand that a violation of this action may result in disciplinary action.

_____

Signature of Employee

DEPARTMENT

_ Department has been notified and has accepted the above individual with the identified work restriction(s).

_ Department has been notified and cannot accept the above individual with the identified work restriction(s).

EXHIBIT 6

STATE OF CALIFORNIA
DEPARTMENT OF MOTOR VEHICLES
DIVISION OF DRIVER SAFETY
16735 VON KARMAN AVENUE, SUITE 110
IRVINE, CA. 92714
(714)440-4416

June 7, 1994

A review of the Medical Information, testimony, and test results is now completed. You may continue your driving

privilege, at this time. No action is necessary. Thank you for your cooperation in this Reexamination.

/s/ R L Harrison
R L Harrison, Driver Safety Officer

EXHIBIT 7

[Logo] **County of Orange** MEMO

August 5, 1994

TO: Capt. Don Spears
Marshal

FROM: Loretta Lee, M.D., M.P.H.
HCA/Employee Health Services

RE: Mark Wehrli
SSN 571-53-5726

Mr. Mark Wehrli has been diagnosed with a seizure disorder and is now under medical treatment. Follow-up evaluation results for Mr. Wehrli have been received. I have again reviewed the medical literature on seizure disorders and have had a discussion with Dr. Leonard Goldberg of L.A.P.D., author of Medical Screening Manual for California Law Enforcement, 1993, P.O.S.T. Standard.

Dr. Goldberg reaffirmed that there is significant increased risk of recurrent seizure in the first five years post initial seizure; the greatest risk is in the first year. Enclosed are two tables showing the risk of recurrent seizures. The department will have to assume an increased risk of

sudden incapacitation if Mr. Wehrli is to continue to work as a peace officer. The risk is near normal after five years. Therefore, I recommend Mr. Wehrli not work in the capacity of peace officer until five years after his initial seizure, provided those five years are seizure free.

Please call me if there are further questions.

LL/jc

cc: Capt. Twellman
Mark Wehrli

HISTORY OF A SINGLE UNPROVOKED IDIOPATHIC SEIZURE: An unprovoked idiopathic seizure is one which occurs in the absence of an identifiable alteration of systemic metabolic function or insult to the structural integrity of the brain. Although more than one seizure is necessary to make the diagnosis of epilepsy, the probability of recurrence within 3 years has been reported to be as high as 70%.

The most useful quantitative data for risk assessment are found in a multivariate study by Hauser, et al., 1990, which followed 149 patients for an average of four years after an initial idiopathic seizure (i.e., no history of recent or remote cerebral insult). The overall 3-year recurrence rate was 30%, which is lower than that found in other studies. Therefore, if any bias occurs due to reliance upon this single study, it would be in favor of the candidate.

Multivariate analysis identified only two risk factors that were statistically significant: having a generalized spike and wave (GSW) pattern on an EEG regardless of symmetry, repetition, rate, regularity, or state of alertness (rate

ratio = 2.69); and having a sibling with epilepsy (rate ratio = 2.51). The expected annual rates of recurrence based on these factors is shown in Table IX-2.

TABLE IX-2
Annual Probability of Seizure Recurrence After a Single Unprovoked Seizure (Data from Hauser, et al., 1990)

Risk Factors (n)	Probability of Seizure Recurrence Between: 0-12 Months	13-24 Months	25-36 Months	37-48 Months	49-60 Months
None (78)	7%	6%	3.7%	2.3%	1.6%→
Sibling with epilepsy (10)	15%	15%	8%	3.1%	
GSW on EEG (10)	17%	16%	8%	3.2%	

Of note in this study was that although 80% of the patients were on medication, this did not favorably affect recurrence rates. The authors comment that this finding is consistent with other studies that have not shown treatment to be effective in this group of patients (Camfield, et al., 1985; Hopkins, et al., 1988; Shinnar, et al., 1990; Annegers, et al., 1986; Hirtz, et al., 1984).

Other studies have also found that an abnormal EEG has been a consistent predictor of recurrence, although there has not been agreement on the nature of the predictive abnormality. In the Hauser study, only a generalized

spike and wave (GSW) pattern was associated with an increased recurrence risk. Other studies report only a focal EEG (Camfield, et al., 1985) or any abnormal EEG (Annegers, et al., 1986; Shinnar, et al., 1990) to be predictive of recurrence.

The importance of a positive family history is not strongly supported by other studies. Three were unable to detect a statistically significant effect although two of these showed some increased risk (Hopkins, et al., 1988; Shinnar, et al., 1990; Hirtz, et al., 1984).

HISTORY OF EPILEPSY CONTROLLED BY MEDICATION: For a candidate with an established diagnosis of epilepsy (i.e. two or more idiopathic seizures), the annual risk of recurrence primarily depends on (in descending order of importance) recency of the last seizure, level of compliance, number of years that seizures were uncontrolled, and seizure type.

Recency of last seizure: The best study to assess the impact of this factor is by Elwes, et al. (1984), who followed 106 patients with newly diagnosed epilepsy for an average of 5.5 years, and monitored compliance with serum drug levels. Table IX-3, derived from that study, shows that the annual risk of seizure is extremely high in the year following the diagnosis and remains substantial even in patients who are seizure-free four years after medication was begun. Although not directly comparable, the recurrence rates in Table IX-3 are consistent with estimates derived from several other studies (Rodin, et al., 1965; Juul-Jensen, 1968; Overweg, et al., 1987). For prognoses on patients with longer seizure-free periods, the best study is by Annegers, et al. (1979) who followed patients

with idiopathic epilepsy who had achieved a five-year remission. Table IX-4, derived from this study, shows after even 15 years in remission, the annual risk of seizure still ranges from 8-40 times greater than normal, depending on seizure type and age. Unfortunately, the medication status of this cohort is not reported, but the authors do note that one-third of the patients who relapsed were on medication. Supporting the notion that recurrence can occur, despite medication, in patients who have been seizure-free for five years, Oiler-Daurella, et al., (1976) observed that 13% of 39 patients relapsed over an unspecified follow-up period.

TABLE IX-3
Annual Risk of Seizure Recurrence in Newly Diagnosed Epileptic Patients on Medication by Period of Remission After Initiation of Medication (data from Elwes, et al., 1984)

Seizure Status	Risk of Seizure in Next 12 Months
Newly diagnosed	60%
1-2 years without seizures	12%-14%
4 years without seizures	8%

EXHIBIT 8

[M-39]

B. In suspending a regular, limited-term or probationary employee for five (5) days or less, the above notice requirements shall be complied with not more than ten (10) days after the effective date of the suspension.

C. Prior to the effective date of such suspension of more than five (5) days, or reduction or discharge, an employee will be given an opportunity to respond, either orally or in writing, at the employee's option, to a designated Department representative with the authority to make an effective recommendation on the proposed disciplinary action.

D. An employee shall be given reasonable time off without loss of pay to attend a disciplinary hearing.

E. An employee may represent himself or herself or may be represented in the disciplinary hearing by ADMOC.

F. An employee shall receive written notice either sustaining, modifying, or canceling the proposed disciplinary action prior to the effective date of such action except that such written notice may be given after the response period in C., above, for suspension of five (5) days or less.

G. Should a proposed reduction or suspension become final, an employee shall have the right to appeal such action pursuant to Sections 4. and 5. of this Article.

H. Should a proposed discharge become final, an employee shall have the right to appeal such action pursuant to Section 6. of this Article.

Section 4. *Suspension*

A. No regular, limited-term or probationary employee shall be suspended except for reasonable cause.

B. A written notice of such suspension stating specifically the cause of the suspension shall be given to the employee.

C. In accordance with the provisions of Article IX, an appeal of suspension shall be initiated at Step 3 of the grievance/appeal procedure.

Section 5. *Reduction*

➜ A. No regular employee or limited-term regular employee shall be reduced to a position in a lower class for reasons of unsatisfactory performance or physical disability except for reasonable cause.

B. A written notice of such reduction stating specifically the cause of the reduction shall be given to the employee.

[M-40]

C. In accordance with the provisions of Article IX, an appeal of reduction for reasons of unsatisfactory performance or physical disability shall be initiated at Step 3 of the grievance/appeal procedure, except for Reductions imposed by the Joint Marshal's Personnel Committee, which may be referred directly to a hearing before the Judge.

Section 6. *Discharge and Right of Appeal*

➜ A. No regular or limited-term regular employee shall be discharged except for reasonable cause.

B. A written notice of such discharge stating specifically the cause of the discharge shall be given to the employee.

C. In accordance with the provisions of Article IX, a discharge may be appealed directly to Step 4 of the grievance/appeal procedure. An appeal of discharge to Step 4 shall be presented in writing to the Marshal within ten (10) calendar days from the date the discharge was effective.

Section 7. *Polygraph Examination*

No employee shall be compelled to submit to a polygraph examination. No disciplinary action whatsoever shall be taken against an employee refusing to submit to a polygraph examination; nor shall any comment be anywhere recorded indicating that an employee offered to take, took or refused to take a polygraph examination unless otherwise agreed to in writing by the parties; nor shall any testimony regarding the results of a polygraph examination or evidence of any kind regarding an employee's offer to take or refusal to take a polygraph examination be admissible in any proceeding pursuant to the Court Rules and Regulations, unless otherwise agreed to in writing by the parties.

EXHIBIT 9

[M-43] Section 5. *Time off for Processing Grievances/ Appeals*

A. Reasonable time off without loss of pay shall be given to:

1. An employee who has a grievance/appeal in order to attend a meeting with his or her supervisor or other person with authority to resolve

the matter, as prescribed herein, or to meet with his or her grievance/appeal representative.

B. The following restrictions shall applying in all cases to activity authorized in Section 5.A., above:

1. Before performing grievance/appeal work, the grievant/appellant shall obtain permission of his or her supervisor and shall report back to the supervisor when the grievance/appeal work is completed.

2. Neither the grievant/appellant nor the grievance/appeal representative shall interrupt or leave his or her job to perform grievance/appeal work unless his or her supervisor determines that such interruption or absence will not unduly interfere with the work of the unit in which the grievant/appellant or representative is employed. However, an effort will be made to grant such time off as soon as it is feasible to do so.

3. When an authorized grievance/appeal representative must go into another section or unit to investigate a grievance/appeal, the representative shall be permitted to do so provided that:

   a. the representative checks in and checks out with the supervisor of the unit; and

   b. such investigation does not unduly interfere with the work of the unit.

Section 6. *Informal Discussion*

If an employee has a problem relating to a work situation, the employee is encouraged to request a meeting with his or her immediate supervisor to discuss the problem in an effort to clarify the issue and to work cooperatively toward settlement.

Section 7. *Grievance/Appeal Steps*

The grievance/appeal procedure shall consist of the following steps, each of which must be completed prior to any request for further consideration of the matter unless waived by mutual consent or as otherwise provided herein.

EXHIBIT 10

[LOGO] **ORANGE COUNTY MARSHAL**
909 North Main Street/Suite 2/Santa Ana, California 92701/
Phone: (714) 569-3771

MICHAEL S. CARONA
MARSHAL

December 8, 1994

Deputy Marshal Mark Wehrli
Central Division
700 Civic Center Drive West
Santa Ana, CA 92701

Dear Mark:

On April 7, 1994 you were placed on a light duty assignment because of your medical restrictions. On August 5, 1994 a determination was made that you are precluded from performing peace officer duties for five years. Consequently, the Marshal's Department can no longer continue your light duty assignment beyond December 12, 1994.

Given the preceding, and in an effort to make a reasonable accommodation, I am offering you a position as Office Assistant, Marshal, effective December 13, 1994. If you accept a reduction to this position, your salary will be Pay Range D-33, Step 12 ($12.16 hourly).

Please contact me by 3:00 p.m. on Monday, December 12, 1994 to indicate your acceptance or rejection of this job offer. My telephone number is 569-3776. I have enclosed a voluntary reduction memo for your use if you choose to accept this position.

Sincerely,

/s/ Don Spears
Don Spears
Captain

[LOGO] **ORANGE COUNTY MARSHAL**
909 North Main Street/Suite 2/Santa Ana, California 92701/Phone: (714) 569-3771

MICHAEL S. CARONA
MARSHAL

TO: Deputy Mark Wehrli

FROM: Marshal Michael S. Carona

SUBJECT: Voluntary Reduction

I request to take a voluntary reduction from Deputy Marshal I to Office Assistant, Marshal, Pay Range D-33, Step 12, effective December 13, 1994. I understand that I will have no reinstatement rights to a position of Deputy

Marshal I. I further understand that this reduction will result in a change of my status from a peace officer to a non-sworn position and that I will become a member of the general rather than safety retirement system.

Signature: _____

Date: _____

EXHIBIT 11

STONE & FEELEY, P.C.
LAWYERS
700 SOUTH FLOWER STREET
FOURTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 236-9670
FACSIMILE (213) 627-2561

December 12, 1994

Michael S. Carona, Marshal
County of Orange
909 N. Main Street, Suite 2
Santa Ana, CA 92701

Dear Marshal Carona:

I have Captain Spears' letter of December 8, 1994, and I have a proposed "memo" which I presume is to be executed by Mark today.

We understand that at this point, you are proceeding on the following premises:

1. Mark's medical condition precludes his assignment to full peace officer duties for a period of five (5) years, based on the conclusions reached by Dr. Lee; and

2. Your Department has no alternative peace officer position available to accommodate Mark's physical limitations described in 1. above.

Therefore, Mark is being offered the opportunity to take a "voluntary" reduction to "Office Assistant", range D-33, effective December 13, 1994.

This action is *solely* due to the aforementioned premises 1. and 2., above, and for no other reason, i.e. poor performance, discipline or unfitness.

These assumptions appear to be undisputed, and if we agree, we can move on to the central focus of this letter. If not however, please call me at once. The advice I have given Mark depends in part for its substance on the truth of the premises set forth above.

If we are in agreement, the ball, so to speak, is in our court. If Mark *declines* this position, i.e. declines to "request" it, our assumption is that he would be separated from County employment forthwith. If this assumption is correct, we may proceed to the next issue. If not, please call at once, because again, different advice may flow from any other premise.

Assuming the truth of the third premise, the reality is that accepting this position could not be "voluntary", because he is faced with the Hobson's choice of accepting a position with significant losses of benefits, salary and career development, or declining it as unsatisfactory and being on the street, unemployed.

Given these circumstances, and to avoid unemployment, Mark will accept the position gratefully, *so long as* he is not required to waive any right of appeal under the Court Personnel Rules and Regulations (1993) announced in my November 16, 1994 memo to Assistant Marshal Hill (attached), to test premises 1. and 2.

I believe there may be good grounds to challenge the first premise, but I am still investigating that.

Mark will meet with you as requested today at 3:00 p.m.

If there are any questions, please call.

Cordially,

/s/ Michael P. Stone
MICHAEL P. STONE

MPS:mb
cc: Mark Wehrli

EXHIBIT 12

[LOGO]
Mullikin Medical Centers

Corporate Office
17821 South Pioneer Blvd.
Artesia, CA 90701
Phone (310) 860-6611
Fax (310) 860-3955

May 3, 1994

TO WHOM IT MAY CONCERN

RE: Patient: WEHRLI, MARK
Social Security Number: 571-53-5726

To Whom It May Concern:

Mr. Wehrli has been evaluated in Neurological Consultation on 3/3/1994. He was diagnosed as having had two seizures. The first event occurred in October of 1993 and was of unclear etiology and therefore not treated. Retrospectively, this was most likely his first manifestation of this minimal disorder which subsequently recurred in march of 1994. The patient was placed on anti-convulsant medications, specifically, Dilantin 300 mg. daily for seizure control. He has been seizure-free since the institution of this medication without remarkable adverse affects [sic].

The patient's workup has included a CT scan of the brain which was performed in October upon his initial symptom and apparently unremarkable. Presumably, this was a noncontrast CT scan. A CT with contrast was obtained on 4/7/94 and proven to be normal as well.

There is no identified underlying structural lesion which might account for a seizure focus, nor is there any particularly patient history suggestive of underlying seizure focus, particularly not of a progressive nature.

On the basis of the above presentation and the results of his neurologic workup, I consider the likelihood of recurrent seizures in this patient while taking anti-convulsant medications, specifically Dilantin, to be very low. I would estimate that this likelihood is about 5-10% over the next five years. This is particularly so in a patient who is considered most likely to have a record of good medication compliance. In light of this very low probability which decreases further with increasing time from the last clinical event, I do not feel that it is necessary to significantly restrict his employment. Driving privileges are of course deferred to Public Health and more specifically, DMV evaluation.

Mr. Wehrli will continue to be followed in the Neurology Clinic as needed to ensure optimal treatment of this condition which should not pose any particular difficulties in control.

Sincerely,

/s/ Richard Graham M.D.
RICHARD GRAHAM, M.D.
NEUROLOGY

RG:sg

EXHIBIT 13

STONE & FEELEY, P.C.
LAWYERS
700 SOUTH FLOWER STREET
FOURTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 236-9670
FACSIMILE (213) 627-2561

December 12, 1994

By Fax & U.S. Mail

Captain Don Spears
County of Orange
909 N. Main Street, Suite 2
Santa Ana, CA 92701

Re: **Mark Wehrli**

Dear Captain Spears:

I understand you and Mark met today. From my conversation with him at 9:30 p.m. this evening, I need to clarify a few points.

First, he tells me we are in agreement regarding the first two "premises" in my letter of this date. Also, he indicates that you said if he "accepts the voluntary reduction" he would waive any rights he may have to appeal. The proposed memo he would execute also states, " . . . I will have no reemployment rights to a position of Deputy Marshal I."

Thus, it appears to us that Mark was presented with this "choice": Accept a reduction to a clerical position and waive his right to a showing of reasonable cause or justification; or, be discharged outright.

If this is true, with all due respect sir, how can your Department treat an employee with an *apparent* physical disability or handicap in such a manner? If your Department believes that it is making a "reasonable accommodation" for Mark's perceived disability or handicap by offering him a clerical job with salary, benefits and career prospects at less than one-half of his current position, how can it ethically further *condition* the offer of this position by exacting a price for the privilege of acceptance? As a cost of such acceptance Mark is required to "waive" any challenge to the propriety of the action in the first place.

Where the choice is "accept with the conditions" or be discharged, I doubt that any "voluntariness" is present. After all, voluntary usually means freedom from coercion or compulsion. However, we will assume your representation to Mark is correct: that you have counseled with a County attorney and the Employee Relations Administrator, and that you have been assured that this position is legally defensible and correct.

For reasons we have already noted, Mark does not wish to waive the right to challenge this action – a right specifically announced in Article VIII of the Rules. In this connection, I note that even an employee who is laid off can "request a voluntary reduction" and *cannot* be required to waive his grievance rights under Article XI Section 5, B, 4.

Consequently, Mark has no choice at all, in our view. He will not waive his rights to a full-blown hearing on his release due to "physical disability" (Article VIII, Section 3, A.), and to *Government Code § 3304 (b)*, and to the *14th*

Amendment. If this means he will be discharged, we invoke the procedures under Article VII, and request your compliance with § 3, A, 1 through 6, C, D, F and H, § 6, A-C, and Step 4 of the grievance procedures.

If for any reason you believe that Mark is not entitled to these protections please notify me at once.

It is our view that resolving Mark's handicap (if, indeed it is) by offering him the indicated position on condition that he give up any right to be heard on the subject, is both unfair and violative of due process.

Cordially,

/s/ Michael P. Stone
MICHAEL P. STONE

MPS:mb
cc: Mark Wehrli

EXHIBIT 14

STONE & FEELEY, P.C.
LAWYERS
700 SOUTH FLOWER STREET
FOURTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 236-9670
FACSIMILE (213) 627-2561

December 20, 1994

By Fax & U.S. Mail

Captain Don Spears
Office of the Marshal
County of Orange
909 N. Main Street, Suite 2
Santa Ana, CA 92701

Re: **Mark Wehrli**

Dear Captain Spears:

This is in response to the notice of discharge directed to Mark Wehrli. Given the time constraints mentioned in your December 13, 1994 letter, only a brief written response can be provided:

1. We do not believe that a sufficient basis has been demonstrated to declare Mark unfit, in that Dr. Lee's opinion is based on statistical probabilities derived from studies, which are largely speculative in nature, as opposed to the solid medical opinion of Dr. Graham that Mark is fit for full duty. You have this material, so we shall not belabor the point.

2. Mark did not decline to accept the offered position. To the contrary, he accepted the alternative post, notwithstanding it affords him little in the way of benefit, compared to his present position.

3. The Department has chosen to *condition* its "accommodation" upon Mark's waiver of his constitutional rights to due process, and forced him to elect between discharge on the one hand, or acceptance of the position with the requirement that he abandon his due process rights to challenge the propriety of the action in the first instance, on the other.

4. This amounts to a constructive discharge in the first instance, because he is being required to pay a price for the opportunity to avail himself of the offer of alternative employment: the Department is exacting a cost in the form of waiving his rights to appeal.

5. Consequently, we believe that the Department is violating his rights under the 14th Amendment and the A.D.A., because it unnecessarily requires him to select between two equally onerous alternatives, all and only because he is disabled (in Dr. Lee's view).

We hope your [sic] will reconsider. You have alternative employment available. Offer it to Mark *without* requiring him to give up his constitutional rights. He will accept the position gratefully, as we have said; but not if the Department insists that he must first relinquish his due process rights.

Cordially,

/s/ Michael P. Stone
MICHAEL P. STONE

MPS:mb
cc: Mark Wehrli

EXHIBIT 15

[LOGO] **ORANGE COUNTY MARSHAL**
909 North Main Street/Suite 2/
Santa Ana, California 92701/
Phone: (714) 569-3771

MICHAEL S. CARONA
MARSHAL

December 13, 1994

Mark Wehrli
11971 Blackmer St
Garden Grove, CA

RE: NOTICE OF INTENT TO DISCHARGE

Deputy Wehrli:

You are hereby notified that it is the intention of the Orange County Marshal's Department to discharge you from your position of Deputy Marshal I with the Orange County Marshal's Department at 5:00 p.m. on Friday, December 23, 1994.

This proposed action is based upon the following:

> Your medical restrictions prevent you from performing the essential duties of a peace officer.

On or about March 23, 1994, you reported a newly diagnosed seizure disorder which was witnessed. Based upon medical restrictions placed upon you by Dr. Loretta Lee, M.D. of Employee Health Services, you have been in a limited duty capacity since April 7, 1994 pending further evaluation of your medical records. After further medical evaluation by Dr. Lee, she recommends in her memorandum dated August 5, 1994 that because of your diagnosed seizure disorders you should not work in the

capacity of a peace officer for a period of five years after your initial seizure, provided those five years are seizure free. Dr. Lee's recommendation is based upon Peace Officer Standards and Training (P.O.S.T.) medical standards.

Subsequent to August 5, 1994 and continuing until the week of December 5, 1994, as a reasonable accommodation to your medical condition, a job search was conducted of other County of Orange jobs. Additionally, on December 9, 1994 you were specifically offered the position of Office Assistant with the Orange County Marshal's Department. You have refused the job offer of Office Assistant.

You have a right to respond to this notice of intent either orally or in writing. You may represent yourself or be represented in this matter by the Association of Deputy Marshals of Orange County. If you choose to respond in writing, you must do so by Wednesday, December 22, 1994. If you wish to respond orally, contact the Marshal's secretary at 569-3771 and arrange for a meeting with the Marshal or his designee to be held no later than Wednesday, December 22, 1994. Written materials upon which this proposed discharge is based are enclosed with this notice. Should the proposed discharge be imposed, you have the right to initiate an appeal in accordance with Article VIII, Section 6.C of the Court Personnel Rules and Regulations, Marshal Unit.

/s/ Don Spears
Don Spears
Captain

cc: Command Staff
Personnel File

Enclosures: Work Restriction Notice dated 4-7-94

Memorandum dated April 13, 1994 from Dr. Lee to Capt. Twellman

Memorandum dated July 12, 1994 from Dr. Lee to Capt. Twellman

Memorandum dated August 5, 1994 from Dr. Lee to Capt. Spears

Articles VII and IX of the Court Personnel Rules and Regulations, Marshals Unit

EMPLOYEE HEALTH SERVICES

WORK RESTRICTION NOTICE –
MEDICAL CLASSIFICATION "C"

Department Marshal Date 4-7-94

Regarding Mark Wehrli Position Title Dep. 1

The above _ Applicant X Employee SS# 571-53-5726

__ with an alleged work related injury/illness date of inquiry _____

__ with a non-work related condition

X undetermined

date of injury ____

MAY WORK WITH THE FOLLOWING LIMITATIONS:

__ LIMITATION 1 – NO LIFTING OR CARRYING, PULLING OR PUSHING MORE THAN _____ LBS.

__ LIMITATION 2 – NO REPEATED BENDING, STOOPING OR TWISTING.

__ LIMITATION 3 – NO REPETITIVE CLIMBING, SQUATTING, KNEELING OR TWISTING.

___ LIMITATION 4 – LIMIT STANDING OR WALKING TO _____ PER HOUR/AT A TIME; BENCH OR DESK WORK PREFERRED.

___ LIMITATION 5 – LIMIT SITTING TO _____ PER HOUR/AT A TIME CHANGE POSITION PERIODICALLY.

___ LIMITATION 6 – NO REPETITIVE ACTIVITIES OF THE _____ HAND, ELBOW, SHOULDER.

X LIMITATION 7 – NO DRIVING OF COUNTY VEHICLES OF ANY KIND, OR DRIVING PRIVATE VEHICLE ON COUNTY BUSINESS.

___ LIMITATION 8 – NO ALTERCATION/RESTRAINT ACTIVITIES.

___ LIMITATION 9 – NO WORKING WITH _____ ARM ABOVE SHOULDER LEVEL.

___ LIMITATION 10 – NO WORKING ON LADDERS, SCAFFOLDING OR IN OTHER HIGH PLACES.

___ LIMITATION 11 – NOT PERMITTED TO OPERATE HEAVY EQUIPMENT/POWER MACHINERY.

___ LIMITATION 12 – ATTEND PHYSICAL THERAPY _____ TIMES PER WEEK.

X LIMITATION 13 – OTHERS: Recommend not to work in the capacity of a peace officer. Send results of tests to Employee Health Services. To replace release dated 4-6-94.

RESTRICTIONS APPLY UNTIL:

X 7-13-94 (DATE)

___ CHANGED OR RELEASED BY TREATING PHYSICIAN.

X RE-EVALUATION AT EMPLOYEE HEALTH ON 7-13-94.

__ PERMANENT

/s/ Illegible
Signature of Physician/~~Nurse~~

RETURN TO WORK
EMPLOYEE NOTIFICATION OF
MEDICAL RESTRICTION

I, the undersigned, have been advised by County of Orange Employee Health Services, that a medical restriction has been placed on my activities while performing any duties within the scope of my employment with the County of Orange. I have read and understand the medical restriction to refrain from specific activities as detailed above. I further understand that it is my responsibility not to violate this restriction without specific authorization from County of Orange Employee Health Services. I further understand that if County supervision requires that I perform duties that would violate this restriction, I will immediately advise that supervisor and other County management, if necessary, of my restriction before performing the requested duties. I understand that a violation of this restriction may result in disciplinary action.

_____
Signature of Employee

DEPARTMENT

__ Department has been notified and has accepted the above individual with the identified work restriction(s).

___ Department has been notified and cannot accept the above individual with the identified work restriction(s).

Date _____ Authorized by _____

MEMO

[LOGO] *County of Orange*

April 13, 1994

TO: Captain Tom Twellman
Marshal Department

FROM: Loretta Lee, M.D., M.P.H.
HCA/Employee Health Services

RE: Mark Wehrli, SSN 571-53-5726

Mark Wehrli had been evaluated at our office on a return to work visit April 6, 1994. He reported a newly diagnosed seizure disorder which was witnessed on March 23, 1994. Mr. Wehrli is undergoing further medical diagnostic testing and these results are not yet available to our office for review. He has been placed on anti-seizure medication and the results of his blood level are pending. Mr. Wehrli has been placed on restrictions for driving by the DMV. A work restriction notice from Employee Health dated April 7, 1994, recommends that Mr. Wehrli not work in the capacity of peace officer and not drive on County business (see attached).

You have requested that I provide an estimation of the duration of Mr. Wehrli's restrictions. At present,

requested medical records have not been received. Therefore, the recommendations are based on the assumption that Mr. Wehrli had a recently diagnosed seizure disorder. The POST medical standards were used in reference to information regarding seizure disorders. The guidelines quoted a study that there is significant increased risk of seizure for individuals started on anti-seizure medication. The risk of seizure in the first twelve months of a newly diagnosed case is 60%; 1-2 years without seizure is 12-14%; and 4 years without seizure is 8% (see attached table). Therefore, there is a significant risk of Mr. Wehrli's having a seizure in the next 1-5 years.

At this time, I would recommend that Mr. Wehrli not work in the capacity of peace officer. It is estimated that his risk is increased up to five years after his newly diagnosed seizures. I shall be providing you with updates on this case as medical records become available. Please call me at 571-5703 if there are further questions.

LL/jc

The importance of a positive family history is not strongly supported by other studies. Three were unable to detect a statistically significant effect although two of these showed some increased risk (Hopkins, et al., 1988; Shinnar, et al., 1990; Hirtz, et al., 1984).

HISTORY OF EPILEPSY CONTROLLED BY MEDICATION: For a candidate with an established diagnosis of epilepsy (i.e. two or more idiopathic seizures), the annual risk of recurrence primarily depends on (in descending order of importance) recency of the last seizure, level of

compliance, number of years that seizures were uncontrolled, and seizure type.

Recency of last seizure: The best study to assess the impact of this factor is by Elwes, et al. (1984), who followed 106 patients with newly diagnosed epilepsy for an average of 5.5 years, and monitored compliance with serum drug levels. Table IX-3, derived from that study, shows that the annual risk of seizure is extremely high in the year following the diagnosis and remains substantial even in patients who are seizure-free four years after medication was begun. Although not directly comparable, the recurrence rates in Table IX-3 are consistent with estimates derived from several other studies (Rodin, et al., 1965; Juul-Jensen, 1968; Overweg, et al., 1987). For prognoses on patients with longer seizure-free periods, the best study is by Annegers, et al. (1979) who followed patients with idiopathic epilepsy who had achieved a five-year remission. Table IX-4, derived from this study, shows after even 15 years in remission, the annual risk of seizure still ranges from 8-40 times greater than normal, depending on seizure type and age. Unfortunately, the medication status of this cohort is not reported, but the authors do note that one-third of the patients who relapsed were on medication. Supporting the notion that recurrence can occur, despite medication, in patients who have been seizure-free for five years, Oiler-Daurella, et al. (1976) observed that 13% of 39 patients relapsed over an unspecified follow-up period.

TABLE IX-3
Annual Risk of Seizure Recurrence in Newly Diagnosed Epileptic Patients on Medication by Period of Remission

After Initiation of Medication (data from Elwes, et al., 1984)

Seizure Status	Risk of Seizure in Next 12 Months
Newly diagnosed	60%
1-2 years without seizures	12%-14%
4 years without seizures	8%

MEMO

[LOGO] *County of Orange*

July 12, 1994

TO: Capt. Twellman
Marshal Department

FROM: Loretta Lee, M.D., M.P.H.
HCA/Employee Health Services

RE: Mark Wehrli
SSN 571-53-5726

This is a follow-up report on Mark Wehrli regarding his seizure disorder. Medical records have been received and reviewed. A letter was sent on July 7, 1994 and a follow-up telephone call to Richard Graham, M.D., was made on July 12, 1994. Dr. Graham states that he will perform an EEG and a recheck of Mr. Wehrli's Dilantin levels.

Based on current available information, it is my medical recommendation that Mr. Wehrli continue on modified work of no peace officer duties until March 1995. If there are further questions, please call me.

LL/jc

HISTORY OF A SINGLE UNPROVOKED IDIOPATHIC SEIZURE: An unprovoked idiopathic seizure is one which occurs in the absence of an identifiable alteration of systemic metabolic function or insult to the structural integrity of the brain. Although more than one seizure is necessary to make the diagnosis of epilepsy, the probability of recurrance within 3 years has been reported to be as high as 70%.

The most useful quantitative data for risk assessment are found in a multivariate study by Hauser, et al., 1990, which followed 149 patients for an average of four years after an initial idiopathic seizure (i.e., no history of recent or remote cerebral insult). The overall 3-year recurrence rate was 30%, which is lower than that found in other studies. Therefore, if any bias occurs due to reliance upon this single study, it would be in favor of the candidate.

Multivariate analysis identified only two risk factors that were statistically significant: having a generalized spike and wave (GSW) pattern on an EEG regardless of symmetry, repetition, rate, regularity, or state of alertness (rate ratio = 2.69); and having a sibling with epilepsy (rate ratio = 2.51). The expected annual rates of recurrence based on these factors is shown in Table IX-2.

TABLE IX-2
Annual Probability of Seizure Recurrence After a Single Unprovoked Seizure (data from Hauser, et al., 1990)

Risk Factors (n)	Probability of Seizure Recurrence Between: 0-12 Months	13-24 Months	25-36 Months	37-48 Months	49-60 Months
None (78)	7%	6%	3.7%	2.3%	1.6% →
Sibling with epilepsy (10)	15%	15%	8%	3.1%	
GSW on EEG (10)	17%	16%	8%	3.2%	

Of note in this study was that although 80% of the patients were on medication, this did not favorably affect recurrence rates. The authors comment that this finding is consistent with other studies that have not shown treatment to be effective in this group of patients (Camfield, et al., 1985; Hopkins, et al., 1988; Shinnar, et al., 1990; Annegers, et al., 1986; Hirtz, et al., 1984).

Other studies have also found that an abnormal EEG has been a consistent predictor of recurrence, although there has not been agreement on the nature of the predictive abnormality. In the Hauser study, only a generalized spike and wave (GSW) pattern was associated with an increased recurrence risk. Other studies report only a focal EEG (Camfield, et al., 1985) or any abnormal EEG (Annegers, et al., 1986; Shinnar, et al., 1990) to be predictive of recurrence.

The importance of a positive family history is not strongly supported by other studies. Three were unable to detect a statistically significant effect although two of

these showed some increased risk (Hopkins, et al., 1988; Shinnar, et al., 1990; Hirtz, et al., 1984).

HISTORY OF EPILEPSY CONTROLLED BY MEDICATION: For a candidate with an established diagnosis of epilepsy (i.e. two or more idiopathic seizures), the annual risk of recurrence primarily depends on (in descending order of importance) recency of the last seizure, level of compliance, number of years that seizures were uncontrolled, and seizure type.

Recency of last seizure: The best study to assess the impact of this factor is by Elwes, et al. (1984), who followed 106 patients with newly diagnosed epilepsy for an average of 5.5 years, and monitored compliance with serum drug levels. Table IX-3, derived from that study, shows that the annual risk of seizure is extremely high in the year following the diagnosis and remains substantial evert in patients who are seizure-free four years after medication was begun. Although not directly comparable, the recurrence rates in Table IX-3 are consistent with estimates derived from several other studies (Rodin, et al., 1965; Juul-Jensen, 1968; Overweg, et al., 1987). For prognoses on patients with longer seizure-free periods, the best study is by Annegers, et al. (1979) who followed patients with idiopathic epilepsy who had achieved a five-year remission. Table IX-4, derived from this study, shows after even 15 years in remission, the annual risk of seizure still ranges from 8-40 times greater than normal, depending on seizure type and age. Unfortunately, the medication status of this cohort is not reported, but the authors do note that one-third of the patients who relapsed were on medication. Supporting the notion that recurrence can occur, despite medication, in patients who

have been seizure-free for five years, Oller-Daurella, et al., (1976) observed that 13% of 39 patients relapsed over an unspecified follow-up period.

TABLE IX-3
Annual Risk of Seizure Recurrence in Newly Diagnosed Epileptic Patients on Medication by Period of Remission After Initiation of Medication (data from Elwes, et al., 1984)

Seizure Status	Risk of Seizure in Next 12 Months
Newly diagnosed	60%
1-2 years without seizures	12%-14%
4 years without seizures	8%

MEMO

[LOGO] *County of Orange*

August 5, 1994

TO: Capt. Don Spears
Marshal

FROM: Loretta Lee, M.D., M.P.H.
HCA/Employee Health Services

RE: Mark Wehrli
SSN 571-53-5726

Mr. Mark Wehrli has been diagnosed with a seizure disorder and is now under medical treatment. Follow-up evaluation results for Mr. Wehrli have been received. I have

again reviewed the medical literature on seizure disorders and have had a discussion with Dr. Leonard Goldberg of L.A.P.D., author of Medical Screening Manual for California Law Enforcement, 1993, P.O.S.T. Standard.

Dr. Goldberg reaffirmed that there is significant increased risk of recurrent seizure in the first five years post initial seizure; the greatest risk is in the first year. Enclosed are two tables showing the risk of recurrent seizures. The department will have to assume an increased risk of sudden incapacitation if Mr. Wehrli is to continue to work as a peace officer. The risk is near normal after five years. Therefore, I recommend Mr. Wehrli not work in the capacity of peace officer until five years after his initial seizure, provided those five years are seizure free.

Please call me if there are further questions.

LL/jc

cc: Capt. Twellman
Mark Wehrli

[M-38] ARTICLE VIII
DISCIPLINARY ACTION

Section 1. *Authority*

Judges of the Courts specifically find that the discipline and/or discharge of Department employees shall be determined and imposed, when necessary, by the Marshall.

Section 2. *Reprimand and Substandard Performance Evaluation*

No regular, limited-term or probationary employee shall receive a written reprimand or a substandard performance evaluation except for reasonable cause.

A written reprimand or substandard performance evaluation (i.e., a score of less than 300 points) given to a regular, limited-term or probationary employee may be appealed through the grievance/appeal procedure. Such appeal shall be initiated at Step 1 of the grievance/appeal procedure.

Section 3. *Disciplinary Hearing for Suspension, Reduction or Discharge*

In suspending a regular, limited-term or probationary employee for more than five (5) days or in reducing a regular, limited-term or probationary employee for reasons of unsatisfactory performance or physical disability, or in discharging a regular or limited-term regular employee, a written notice of such proposed disciplinary action shall be served on the employee personally, or by

certified mail, at least ten (10) calendar days prior to the effective date of the proposed action. Such written notice shall contain;

1. a description of the proposed action and its effective date(s);
2. a statement of the reasons for such proposed action, including the acts or omissions on which the proposed action is based;
3. copies of material on which the proposed action is based;
4. a statement of the employee's right to respond, either orally or in writing, prior to the effective date of such proposed action;
5. a statement of the employee's right to representation;
6. a statement of the employee's right to appeal should such proposed action become final.

[M-39]

B. In suspending a regular, limited-term or probationary employee for five (5) days or less, the above notice requirements shall be complied with not more than ten (10) days after the effective date of the suspension.

C. Prior to the effective date of such suspension of more than five (5) days, or reduction or discharge, an employee will be given an opportunity to respond, either orally or in writing, at the employee's option, to a designated Department representative with the authority to make an effective recommendation on the proposed disciplinary action.

D. An employee shall be given reasonable time off without loss of pay to attend a disciplinary hearing.

E. An employee may represent himself or herself or may be represented in the disciplinary hearing by ADMOC.

F. An employee shall receive written notice either sustaining, modifying, or canceling the proposed disciplinary action prior to the effective date of such action except that such written notice may be given after the response period in C., above, for suspension of five (5) days or less.

G. Should a proposed reduction or suspension become final, an employee shall have the right to appeal such action pursuant to Sections 4. and 5. of this Article.

H. Should a proposed discharge become final, an employee shall have the right to appeal such action pursuant to Section 6. of this Article.

Section 4. *Suspension*

A. No regular, limited-term or probationary employee shall be suspended except for reasonable cause.

B. A written notice of such suspension stating specifically the cause of the suspension shall be given to the employee.

C. In accordance with the provisions of Article IX, an appeal of suspension shall be initiated at Step 3 of the grievance/appeal procedure.

Section 5. *Reduction*

A. No regular employee or limited-term regular employee shall be reduced to a position in a lower class for reasons of unsatisfactory performance or physical disability except for reasonable cause.

B. A written notice of such reduction stating specifically the cause of the reduction shall be given to the employee.

[M-46] from the date the decision was rendered.

b. An appeal from discharge may be presented, for a hearing before a judge, in writing to the Marshal within ten (10) calendar days from the date the discharge was effective.

c. All disciplinary appeals shall be signed by a representative of ADMOC and shall be submitted in writing as follows:

Was (employee's name) suspended/reduced/discharged for reasonable cause? If not, to what remedy is the appellant entitled under the provisions of these Court Rules and Regulations.

2. *Findings of Fact and Remedies*

The judge who heard the matter may sustain, modify, or rescind an appealed disciplinary action as follows and subject to the following restrictions:

a. *All Disciplinary Actions*

If the judge finds that the disciplinary action was taken for reasonable cause, he or she shall sustain the action.

b. *Suspension/Reduction*

If the action is modified or rescinded, the appellant shall be entitled to restoration of

pay and/or fringe benefits in a manner consistent with the judge's decision.

c. *Discharges*

1. If the judge finds that the order of discharge should be modified, the appellant shall be restored to a position in his or her former class subject to forfeiture of pay and fringe benefits for all or a portion of the period of time the appellant was removed from duty, as determined by the panel judge.

2. If the judge finds that the order of discharge should be rescinded, the appellant shall be reinstated in a position in his or her former [M-47] class and shall receive pay and fringe benefits for all of the period of time he or she was removed from duty.

d. *Restriction on Remedies*

1. The County shall not be liable for restoring pay and fringe benefits for any period(s) of time the appellant was reduced or removed from duty, which results from the appealing party's request for written briefs and/or a transcript of the proceedings.

2. Restoration of pay and benefits shall be subject to deduction of all unemployment insurance and outside earnings which the appellant received since the date of discharge.

D. *General Provisions*

1. If the grievance/appeal is decided by a judge, the grievant/appellant and ADMOC relinquish any current or future claim to seek or obtain remedy through any other Court appeal procedures.

2. Grievance/Appeal hearings by a judge shall be private.

3. Upon written request by the opposing party in a pending hearing given at least twenty (20) calendar days prior to the scheduled hearing date, the party requested shall supply to the party submitting the request copies of all documentary evidence to be used by that party at the hearing. Such evidence shall be provided no later than ten (10) calendar days prior to the scheduled hearing date. Any evidence not so provided may not be admitted or offered as evidence at the subsequent hearing except that any such documentary evidence discovered by a party after such a request for copies, but not soon enough to comply with the above time limits, may be admitted providing it could not have been discovered sooner by reasonable means and provided further that a copy or copies of such evidence be afforded the requesting party as practicable after such discovery. Nothing contained herein shall operate to prevent either party from presenting additional documents by way of rebuttal.

4. An employee shall not suffer loss of pay for time spent as a witness at a hearing held pursuant to this procedure. The number of witnesses requested

[M-44]
Step 1: *Immediate Supervisor*

The employee may formally submit a grievance to the immediate supervisor within fourteen (14) calendar days from the occurrence which gives rise to the problem. Such submission shall be in writing and shall state the nature of the grievance and the suggested solution. Within seven (7) calendar days after receipt of the written grievance, the immediate supervisor shall meet with the grievant. Within seven (7) calendar days thereafter, a written decision shall be given to the grievant.

Step 2: *Department Head*

If the grievance is not settled under Step 1, it may be presented to the Marshal. The grievance shall be submitted within seven (7) calendar days after the receipt of the written decision from Step 1. Within seven (7) calendar days after the receipt of the written grievance, the Marshal or his or her representative shall meet with the grievant. Within seven (7) calendar days thereafter, a written decision shall be given to the grievant.

The decision of the Marshal on grievances concerning a substandard performance evaluation or a written reprimand shall be final.

Step 3: *Joint Marshal's Personnel Committee*

If the grievance/appeal is not settled under Step 2 and it concerns:

A. an interpretation or an application of these Rules;

B. a deferment or denial of a merit increase,

C. an appeal of a selection procedure,

it may be appealed in writing to the Joint Marshal's Personnel Committee within seven (7) calendar days after receipt of the written decision from Step 2. Appeal of a suspension and/or a reduction ordered by the Marshal or his or her designated representative may be submitted in writing at Step 3 within ten (10) calendar days after receipt of the notice of suspension and/or reduction. Within fourteen (14) calendar days after receipt of the written grievance/appeal, the Joint Marshal's Personnel Committee or a member of the joint Marshal's Personnel Committee shall meet with the grievant/appellant. Within fourteen (14) calendar days thereafter, a written decision shall be given to the grievant/appellant.

[M-45] The decision of the Joint Marshal's Personnel Committee in B., above, shall be final and binding.

Step 4: *Referrals to Hearing Before Judge*

A. *Panel of Judges*
One (1) judge from each of the five Municipal Courts and five (5) judges from the Superior Court shall be selected by lot. The selection of such judges by lot shall be conducted at a time when representatives of ADMOC are present. From the ten (10) judges so selected, five (5) judges, representing both Municipal and Superior Courts, shall be mutually agreed upon by the Marshal and ADMOC to serve on the panel of judges. Judges serving on the Joint Marshal's Personnel Committee shall be excluded from the selection

by lot and shall not be members of the judges panel ultimately selected by mutual agreement between the Marshal and ADMOC.

B. *Grievances and Disciplinary Appeals*

1. If a grievance or an appeal from suspension or reduction is not resolved under Step 3, a request for hearing before a judge who is a member of the judges panel may be presented in writing to the Marshal within seven (7) calendar days from the date a decision was rendered at Step 3. When such request is received, the hearing judge shall be selected by lot from the panel of five (5) judges in the presence of the Marshal and the employee and/or his representative, excluding the judge serving in the Court which is the situs of the employee's position.

2. The parties shall either sign a joint issue submission statement or else execute and sign separate alternative issue statements after discussing the issue(s). In either case the parties shall send copies of their joint or separate submission statement(s) to the agreed upon judge and to each other within (14) calendar days before the first scheduled date of the hearing.

C. *Procedures*

1. *Submission Procedure*

a. If an appeal from suspension or reduction is not settled at Step 3, it may be presented for a hearing before a judge within seven (7) calendar days

[M-48] to attend, and their scheduling, shall be reasonable.

5. At the hearing, both the appealing employee and the Department shall have the right to be heard and to present evidence. The following rules shall apply:

   a. Oral evidence shall be taken only on oath or affirmation.

   b. Each party shall have these rights: to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to impeach any witness regardless of which party first called the witness to testify, and to rebut the evidence against the witness. If the employee does not testify in his or her own behalf, the employee may be called and examined as if under cross-examination.

6. The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might have made improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded.

7. The Department and ADMOC each shall be allowed to have at least one (1) of their own employees, who may be called upon to testify as a witness, present at the hearing at all times.

8. The decision of the panel judge shall be final and binding on all parties and shall not be subject to judicial review.

[M-49] ARTICLE X

ON THE JOB INJURIES, WORKERS' COMPENSATION AND MEDICAL INSURANCE

Section 1. *On-the-Job Injuries*

A. *Medical Treatment*

Whenever an employee sustains an injury or disability arising out of and in the course of County/Department employment which requires medical treatment, the employee shall obtain such treatment pursuant to the appropriate California Labor Code sections.

B. *Disability Payments and Leave*

Whenever an employee is compelled to be absent from duty by reason of injury or disease arising out of and in the course of County/Department employment, the employee shall be compensated and placed on leave pursuant to California Labor Code Section 4850. An employee who is eligible for benefits under California Labor Code Section 4850 shall be placed on 4850 Leave.

Section 2. *Exhaustion of 4850 Benefits*

A. When an employee has exhausted all rights and benefits provided by California Labor Code Section 4850, and such employee continues to be unable to return to work due to an injury or disease arising out of and in the course of County/Department employment, such employee shall be treated in the following manner:

   1. he or she or [sic] shall be entitled to all benefits provided by California Workers' compensation Law, and

   2. he or she shall be placed on Workers' Compensation Leave pursuant to Article IV, Section 11., and

   3. at the employee's option, all sick leave, compensatory time and vacation shall be added to the workers' compensation temporary disability benefit, if eligible for such benefit, which shall equal 100 percent of the employee's base salary until such accruals are exhausted, or

   4. if the employee is not eligible for temporary disability or exhausts his or her temporary disability benefit, at the employee's option such accruals shall be continued until they are exhausted. An election to continue accruals shall be irrevocable.

B. Upon exhaustion of all sick leave, compensatory time and vacation, the employee shall not accrue sick leave or

[M-44]
Step 1: *Immediate Supervisor*

The employee may formally submit a grievance to the immediate supervisor within fourteen (14) calendar days from the occurrence which gives rise to the problem.

Such submission shall be in writing and shall state the nature of the grievance and the suggested solution. Within seven (7) calendar days after receipt of the written grievance, the immediate supervisor shall meet with the grievant. Within seven (7) calendar days thereafter, a written decision shall be given to the grievant.

Step 2: *Department Head*

If the grievance is not settled under Step 1, it may be presented to the Marshal. The grievance shall be submitted within seven (7) calendar days after the receipt of the written decision from Step 1. Within seven (7) calendar days after the receipt of the written grievance, the Marshal or his or her representative shall meet with the grievant. Within seven (7) calendar days thereafter, a written decision shall be given to the grievant.

The decision of the Marshal on grievances concerning a substandard performance evaluation or a written reprimand shall be final.

Step 3: *Joint Marshal's Personnel Committee*

If the grievance/appeal is not settled under Step 2 and it concerns:

A. an interpretation or an application of these Rules;

B. a deferment or denial of a merit increase,

C. an appeal of a selection procedure,

it may be appealed in writing to the Joint Marshal's Personnel Committee within seven (7) calendar days after receipt of the written decision from Step 2. Appeal of a

suspension and/or a reduction ordered by the Marshal or his or her designated representative may be submitted in writing at Step 3 within ten (10) calendar days after receipt of the notice of suspension and/or reduction. Within fourteen (14) calendar days after receipt of the written grievance/appeal, the Joint Marshal's Personnel Committee or a member of the joint Marshal's Personnel Committee shall meet with the grievant/appellant. Within fourteen (14) calendar days thereafter, a written decision shall be given to the grievant/appellant.

[M-45] The decision of the Joint Marshal's Personnel Committee in B., above, shall be final and binding.

Step 4: *Referrals to Hearing Before Judge*

A. *Panel of Judges*

One (1) judge from each of the five Municipal Courts and five (5) judges from the Superior Court shall be selected by lot. The selection of such judges by lot shall be conducted at a time when representatives of ADMOC are present. From the ten (10) judges so selected, five (5) judges, representing both Municipal and Superior Courts, shall be mutually agreed upon by the Marshal and ADMOC to serve on the panel of judges. Judges serving on the Joint Marshal's Personnel Committee shall be excluded from the selection by lot and shall not be members of the judges panel ultimately selected by mutual agreement between the Marshal and ADMOC.

B. *Grievances and Disciplinary Appeals*

1. If a grievance or an appeal from suspension or reduction is not resolved under Step 3, a request for hearing before a judge who is a member of the judges panel may be presented in writing to the Marshal within seven (7) calendar days from the date a decision was rendered at Step 3. When such request is received, the hearing judge shall be selected by lot from the panel of five (5) judges in the presence of the Marshal and the employee and/or his representative, excluding the judge serving in the Court which is the situs of the employee's position.

2. The parties shall either sign a joint issue submission statement or else execute and sign separate alternative issue statements after discussing the issue(s). In either case the parties shall send copies of their joint or separate submission statement(s) to the agreed upon judge and to each other within (14) calendar days before the first scheduled date of the hearing.

C. *Procedures*

1. *Submission Procedure*

a. If an appeal from suspension or reduction is not settled at Step 3, it may be presented for a hearing before a judge within seven (7) calendar days

[M-40] In accordance with the provisions of Article IX, an appeal of reduction for reasons of unsatisfactory performance or physical disability shall be initiated at Step 3 of the grievance/appeal procedure, except for Reductions

imposed by the Joint Marshal's Personnel Committee, which may be referred directly to a hearing before the Judge.

Section 6. *Discharge and Right of Appeal*

No regular or limited-term regular employee shall be discharged except for reasonable cause.

A written notice of such discharge stating specifically the cause of the discharge shall be given to the employee.

In accordance with the provisions of Article IX, a discharge may be appealed directly to Step 4 of the grievance/appeal procedure. An appeal of discharge to Step 4 shall be presented in writing to the Marshal within ten (10) calendar days from the date the discharge was effective.

Section 7. *Polygraph Examination*

An employee shall be compelled to submit to a polygraph examination. No disciplinary action whatsoever shall be taken against an employee refusing to submit to a polygraph examination; nor shall any comment be anywhere recorded indicating that an employee offered to take, took or refused to take a polygraph examination unless otherwise agreed to in writing by the parties; nor shall any testimony regarding the results of a polygraph examination or evidence of any kind regarding an employee's offer to take or refusal to take a polygraph examination be admissible in any proceeding pursuant to the Court Rules and Regulations, unless otherwise agreed to in writing by the parties.

[M-41] ARTICLE IX
GRIEVANCE PROCEDURE AND DISCIPLINARY APPEALS

Section 1. *Scope of Grievances*

A. A grievance may be filed if a management interpretation or application of the provisions of the Court Rules and Regulations adversely affects an employee's wages, hours or conditions of employment.

B. Specifically excluded from the scope of grievances are:

1. Subjects involving the amendment or change of Court Rules and Regulations, which do not incorporate the provisions of this agreement.

2. Matters which have other means of appeal.

3. Position classification.

4. Standard or better performance evaluations.

Section 2. *Basic Rules*

A. If an employee does not present a grievance/appeal or does not appeal the decision rendered regarding his or her grievance/appeal within the time limits, the grievance/appeal shall be considered resolved.

B. If a Department representative does not render a decision to the employee within the time limits, the employee may within seven (7) calendar days thereafter appeal to the next step in the procedure.

C. If it is the judgment of any management representative that he or she does not have the authority to resolve the grievance/appeal, he or she may refer it

to the next step in the procedure. By mutual agreement of the Marshal and ADMOC, Steps 1 and 2 of the grievance procedure may be waived.

D. The Marshal may temporarily suspend grievance/appeal processing on a section-wide, unit-wide, division-wide, department-wide or court-wide basis in an emergency situation. ADMOC may appeal this decision to the Joint Marshal's Personnel Committee.

E. Upon written consent of the parties, i.e., the representatives of the Department and the employee or his or her representative, the time limits at any step in the procedure may be extended.

F. Every reasonable effort shall be made by the employee and the Department to resolve a grievance/appeal at the lowest possible step in the grievance/appeal procedure.

[M-42] No claim shall be granted for retroactive adjustment of any grievance prior to sixty (60) calendar days from the date of filing the written grievance at Step 1.

In order to encourage frank discussion and compromise in attempting to resolve grievances and other labor disputes, the County and ADMOC agree that the grievance files of the respective parties shall be confidential.

Section 3. *Submission of Grievances*

Any employee or group of employees shall have the right to present a grievance. No employee or group of employees shall be hindered from or disciplined for exercising this right.

If any two (2) or more employees have essentially the same grievance, they may, and if requested by the

Department must, collectively present and pursue their grievance if they report to the same immediate supervisor.

If the grievant is a group of more than three (3) employees, the group shall, at the request of the Department, appoint one (1) or two (2) employees to speak for the collective group. To be considered in a group grievance, employees must affirmatively identify themselves as grievants when the grievance is filed at Step 3.

The Marshal shall consolidate appeal hearings of more than one deputy into one hearing if the discipline arises from the same incident and a conflict does not exist between deputies.

Section 4. *Employee Representation*

An employee may represent himself or herself or may be represented by ADMOC in the formal grievance/appeal procedure, or by an attorney in appealing a discharge.

Authorized grievance/appeal representatives shall be designated by ADMOC to represent employees for purposes of the grievance/appeal procedure. ADMOC shall notify the Marshal of the names and titles of such representatives and send a copy of such notice to the Joint Marshal's Personnel Committee annually. At all times professional representatives retained by ADMOC shall be recognized to represent employees.

Representation at steps authorized of the grievance/appeal procedure shall be limited to ADMOC representatives. Professional representatives retained by ADMOC shall be recognized to represent employees at Steps 1, 2

and 3 of the grievance/appeal procedure and in a hearing before a judge.

[M-43]
Section 5. *Time Off for Processing Grievances/Appeals*

A. Reasonable time off without loss of pay shall be given to:

1. An employee who has a grievance/appeal in order to attend a meeting with his or her supervisor or other person with authority to resolve the matter, as prescribed herein, or to meet with his or her grievance/appeal representative.

B. The following restrictions shall apply in all cases to activity authorized in Section 5.A., above:

1. Before performing grievance/appeal work, the grievant/appellant shall obtain permission of his or her supervisor and shall report back to the supervisor when the grievance/appeal work is completed.

2. Neither the grievant/appellant nor the grievance/appeal representative shall interrupt or leave his or her job to perform grievance/appeal work unless his or her supervisor determines that such interruption or absence will not unduly interfere with the work of the unit in which the grievant/appellant or representative is employed. However, an effort will be made to grant such time off as soon as it is feasible to do so.

3. When an authorized grievance/appeal representative must go into another section or unit to investigate a grievance/appeal, the representative shall be permitted to do so provided that:

a. the representative checks in and checks out with the supervisor of the unit; and

b. such investigation does not unduly interfere with the work of the unit.

Section 6. *Informal Discussion*

If an employee has a problem relating to a work situation, the employee is encouraged to request a meeting with his or her immediate supervisor to discuss the problem in an effort to clarify the issue and to work cooperatively toward settlement.

Section 7. *Grievance/Appeal Steps*

The grievance/appeal procedure shall consist of the following steps, each of which must be completed prior to any request for further consideration of the matter unless waived by mutual consent or as otherwise provided herein.

[Logo] **ORANGE COUNTY MARSHAL**
909 North Main Street/Suite 2/Santa Ana, California
92701/Phone: (714) 569-3771

MICHAEL S. CARONA
MARSHAL

December 12, 1994

Mark Wehrli
11971 Blackmer St.
Garden Grove, CA

RE: ADMINISTRATIVE LEAVE

Deputy Wehrli:

Pending the outcome of the Notice of Intent to Discharge you will be placed on paid Administrative Leave commencing Tuesday, December 13, 1994. During your period of Administrative Leave, you will be expected to be available by telephone or personal contact at your residence from 8:00 a.m. until 4:00 p.m. Monday through Friday. Absences from your residence during the previously stated times may only be granted with prior approval of a Command Staff member of the Department.

/s/ Don Spears
Don Spears
Captain

cc: Command Staff
Personnel File

VERIFICATION OF MARK J. WEHRLI

I, MARK WEHRLI, declare that I am the plaintiff in the above-entitled action. I have read the foregoing VERIFIED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATION OF CIVIL RIGHTS, WITH SUPPLEMENTAL CLAIMS AND EXHIBITS 1 THROUGH 15; DEMAND FOR JURY TRIAL and know the contents thereof; the contents are true, except as to matters alleged on information and belief, and as to such matters, I believe them to be true.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on this 14th day of January, 1995 at Los Angeles, California.

/s/ Mark J. Wehrli
MARK J. WEHRLI

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE

Pursuant to the Local Rules Governing Duties of Magistrate Judges, Magistrate Judge Charles F. Eick has been designated to hear discovery motions in the within action at the discretion of the assigned District Judge.

Upon the filing of a discovery motion, the motion will be presented to the United States District Judge for consideration and may hereafter be referred to the Magistrate Judge for hearing and determination.

The Magistrate Judge's initials should be used on all documents filed with the Court so that the case number reads as follows:

SA CV-95-42 LHM (Ex)

NOTE: A COPY OF THIS NOTICE MUST BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS.

III. NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

PURSUANT TO GENERAL ORDER 194-G, NOTICE MUST BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS. ADDITIONAL COPIES OF THIS NOTICE HAVE BEEN PROVIDED FOR THAT PURPOSE.

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that the full-time United States Magistrates of this District Court, in addition to their other duties, may, upon the consent of all parties to their civil case, conduct any and all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Copies of appropriate consent

forms for this purpose (Form number CV-11) are available from the Clerk of Court.

Your opportunity to have your case disposed of by a Magistrate is subject to the calendar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a Magistrate for disposition.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States Magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court by submitting form number CV-11 after it has been completed. Only if *all* parties to the case consent to the reference to a Magistrate will either the Judge or Magistrate to whom the case has been assigned be informed of your decision.

The parties may stipulate to the designation of a specific Magistrate to conduct all further proceedings. A space is provided on the consent form for use by parties if they desire to stipulate to a specific Magistrate.

NOTE: The parties *may not* stipulate to the designation of a specific Magistrate in a case which has already been assigned to a Magistrate for a report and recommendation. If the case has been so assigned, it shall remain assigned to the assigned Magistrate. (General Order 194-G, 6.6.04.01).

Any appeal from a judgment of the Magistrate shall be taken to the United States Court of Appeal in the same manner as an appeal from any other judgment of the district court in accordance with 28 U.S.C. §636(c)(3). In

the alternative, in accordance with 28 U.S.C. §636(c)(4), at the time of the reference to a Magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals, subject to the limitation contained in 28 U.S.C. §636(c)(5) which provides that cases appealed under 28 U.S.C. §636(c)(4) "may be reviewed by the appropriate United States Court of Appeals upon petition for leave to appeal by a party stating specific objections to the judgment."

Form number CV-11 provides an opportunity for parties to designate their election of appellate alternatives under 28 U.S.C. §636(c)(3) or 28 U.S.C. §636(c)(4).

CLERK, UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Logo]

Los Angeles County Bar Association

Litigation Guidelines

Adopted by the Board of Trustees April, 1989

These Guidelines have been endorsed by the United States District Court for the Central District of California.

THESE GUIDELINES ARE REQUIRED TO BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS. ADDITIONAL COPIES HAVE BEEN PROVIDED FOR THAT PURPOSE.

Preamble

MANY BELIEVE that relations between lawyers have so deteriorated that our profession nears a crisis – one that not only implicates how we deal with each other but threatens our usefulness to society, the ability of our clients to bear the cost of our work and the essential values that mark us as professionals.

There have always been lawyers who have abused each other and the judicial system, but they seemed to be few in number. Now, some perceive, abusive conduct is gaining new adherents cloaked in the mantle of forceful advocacy. They proclaim that clients are best served by the intimidation of opponents, a relentless refusal to accommodate and the use of tactics that impose escalating expense on an adversary. Be difficult and the other side may cave, they think.

The Committee on Professionalism of the Los Angeles County Bar Association thinks otherwise. For us, filing needless interrogatories or oppressive document demands are not acceptable tactical ploys just because they will divert the other side by requiring useless work. For us, the refusal to accommodate other counsel is not a sign of strength or determination but a simple act of unreasonableness likely to be revisited on the instigator, all to no productive end. For us, the idea that civility and candor stand in the way of desired results is in fact inconsistent with the achievement of long term goals, including successful results for our clients.

Most lawyers impose high standards on themselves. They are courteous, candid, and accommodating to opponents, judges and witnesses – even when faced with

less professional behavior by their adversaries. By meeting those high standards, lawyers do not sacrifice their clients' interests; they advance them. They do not compromise principles; they show a steady resolve to stand by them.

Still, lawyers are said to be held in low esteem by the public – and sinking lower. Many see us as unpleasant people who put their own egos and monetary ambitions before the interests of clients or society. We know that is not a true picture of the profession as a whole, but growing incidents of questionable conduct make our case an increasingly hard one to make.

If we are right, something must be done. As a modest first step, the Committee has prepared the following guidelines for litigators. We do not expect every lawyer will agree with every guideline. They simply reflect our best effort at encouraging decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics. We have not come out against "hardball" as such nor do we advocate anything less than forceful, dedicated advocacy. But we think our profession will be a better one if the guidelines become the accepted norm.

Nothing in the guidelines is intended to conflict with any court policies or rules which are, of course, paramount.

The Committee on Professionalism of the Los Angeles County Bar Association: William W. Vaughn (Chair), Maxwell M. Blecher, Michael J. Bonesteel, John R. Cadarette, Jr., Richard E. Drooyan, Charles R. English, Catherine B. Hagen, Rex S. Heinke, Clinton M. Hodges,

C. Douglas Kranwinkle, James J. McCarthy, Gavin Miller, Margaret M. Morrow, Andrea S. Ordin, Jay Joel Plotkin, Hon. David M. Rothman, Hon. Pamela A. Rymer, Robert S. Schlifkin, Hon. Diane Wayne, Lee B. Wenzel.

Guidelines

1. Continuances and Extensions of Time

a. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the counsel requesting it has previously refused to grant an extension.

b. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

c. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

d. A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

e. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose

conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.

2. Service of Papers

a. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

b. Papers should not be served sufficiently close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.

c. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.

d. Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

3. Written Submissions to a Court, Including Briefs, Memoranda, Affidavits and Declarations

a. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical,

economic, or sociological data if such data appear in or are derived from generally available sources.

b. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

4. Communications With Adversaries

a. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.

b. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.

c. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.

d. Unless specifically permitted or invited by the court, letters between counsel should not be served to judges.

5. Depositions

a. Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

b. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.

c. When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.

d. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.

e. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.

f. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.

g. Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.

h. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.

i. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.

j. Counsel for all parties should refrain from self-serving speeches during depositions.

k. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

6. Document Demands

a. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

b. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

c. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.

d. Documents should be withheld on the grounds of privilege only where appropriate.

e. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.

f. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

7. Interrogatories

a. Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.

b. Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.

c. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

8. Motion Practice

a. Before filing a motion, counsel should engage in more than a mere pro forma discussion of its purpose in an effort to resolve the issue.

b. A lawyer should not force his or her adversary to make a motion and then not oppose it.

9. Dealing With Non-Party Witnesses

a. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition.

b. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.

c. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available to the adversary at his or her expense even if the deposition is cancelled or adjourned.

10. Ex Parte Communications With the Court

a. A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending.

b. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application.

c. Where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

11. Settlement and Alternative Dispute Resolution

a. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

b. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

c. In every case, counsel should consider whether the client's interest cold be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

12. Trials and Hearings

a. Counsel should be punctual and prepared for any court appearance.

b. Counsel should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility.

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

PURSUANT TO GENERAL ORDER 194-G, NOTICE MUST BE SERVED WITH THE SUMMONS AND COMPLAINT ON ALL DEFENDANTS. ADDITIONAL COPIES OF THIS NOTICE HAVE BEEN PROVIDED FOR THAT PURPOSE.

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that the full-time United States Magistrates of this District Court, in addition to their other duties, may, upon the consent of all parties to their civil case, conduct any and all proceedings in a civil case, including a jury or non-jury trial, and order the

entry of a final judgment. Copies of appropriate consent forms for this purpose (Form number CV-11) are available from the Clerk of Court.

Your opportunity to have your case disposed of by a Magistrate is subject to the calendar requirements of the court. Accordingly, the district judge to whom your case is assigned must approve the reference of the case to a Magistrate for disposition.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States Magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court by submitting form number CV-11 after it has been completed. Only if *all* parties to the case consent to the rference [sic] to a Magistrate will either [sic] the Judge or Magistrate to whom the case has been assigned be informed of your decision.

The parties may stipulate to the designation of a specific Magistrate to conduct all further proceedings. A space is provided on the consent form for use by parties if they desire to stipulate to a specific Magistrate.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK J. WEHRLI, Plaintiff-Appellant, v. COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal, Defendants-Appellees.	No. 97-55040 DC No. CV-95-00042-GLT ORDER (Filed Jun. 11, 1999)

BEFORE: CANBY and KLEINFELD, Circuit Judges, and SCHWARZER,[1] District Judge

A majority of the panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Canby and Schwarzer have recommended denial of the petition for rehearing en banc. Judge Kleinfeld would grant the petition for rehearing and accept the petition for rehearing en banc.

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[1] The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

Supreme Court, U.S.
FILED
OCT 15 1999
OFFICE OF THE CLERK

No. 99-433

In The

Supreme Court of the United States

COUNTY OF ORANGE; MICHAEL S. CARONA, individually and in his official capacity as Orange County Marshal; DON SPEARS, individually and in his official capacity as Captain of the Orange County Marshal,

Petitioners,

vs.

MARK J. WEHRLI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for Certiorari before this Court raises no compelling issue despite defense counsel's formidable mastery of appellate advocacy. Reduced to its elemental terms, the Ninth Circuit decision follows the lead of this Court in treating the unavailability of judicial review as a significant factor in determining whether to give collateral estoppel effect to an arbitral decision. Petitioner seeks to persuade this Court to adopt the position taken in the dissenting opinion, that an unreviewable arbitral decision can indeed be given preclusive effect, so long as the forum was voluntarily elected by the party against whom preclusion is sought. Petitioner suggests that voluntariness, rather than the availability of judicial review, is the key criterion. Petitioner says this is necessary to eliminate confusion in the law.

The present case illustrates the contrary. The availability of judicial review is properly considered a major factor in determining preclusive effect, and furnishes a sensible, workable and equitable criterion. This Court itself said "the opportunity to seek court review of any adverse findings" was a factor in giving preclusive effect to an administrative decision. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966).

Petitioner's suggested criterion of voluntariness would itself create confusion and inequity. Unlike the easily determined legal question of whether judicial review was available, the predominantly factual question of whether a party's submission to arbitration was truly

voluntary invites inquiry into a party's subjective intentions and motivations. Petitioner in this case voluntarily submitted his termination appeal to binding arbitration. If he had not, he and his family would have starved, but that does not lessen the voluntariness of his election. Or does it?

The Ninth Circuit majority reached the correct conclusion. Contrary to petitioner's concern, the Ninth Circuit did not disturb the foundations of collateral estoppel in the slightest. It recognized that "a state administrative decision can have preclusive effect upon a federal section 1983 claim." See App. 4. In *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), "review had been available under state law; the plaintiff had simply failed to avail himself of it." App. 5.

The Ninth Circuit majority reached the apex of the analysis of the "full and fair opportunity to litigate" element in finding that "with no administrative record and no judicial review, Wehrli would have no way of correcting arbitrary administrative action if any occurred." App. 7.

Finally the Ninth Circuit distinguished Wehrli's case from Elliott and other cases where plaintiff failed to take advantage of available judicial review (*Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986); *Eilrich v. Remas*, 839 F.2d 630 (9th Cir. 1988)). Disagreeing with the County's argument that Wehrli is in the same position as a litigant who had failed to take advantage of available judicial review, the Court recognized "[t]he rules of the administrative process themselves foreclosed judicial review; Wehrli had no choice between review or no review. He did not waive

judicial review in any sense meaningful for the purposes of res judicata or collateral estoppel." App. 8.

Implicit in the Ninth Circuit's holding, the litigants who failed to take advantage of judicial review would only have needed to file an appeal to exercise the right, no meaningful sacrifice was extracted from them to preserve their appellate rights. For Wehrli to keep his hopes of state court judicial review alive, he would have had to decline the opportunity to arbitrate and forget about going back to work for the foreseeable future. Wehrli did not have significant control over the extent of his claim he would be submitting to arbitration either. He tried to keep it confined to the law of the shop, App. 22-28, but the District Court ruled he had submitted his constitutional claims anyway. App. 19.

More significantly for present purposes than the fact that the Ninth Circuit granted relief to Wehrli, the opinion leaves the settled part of the law of collateral estoppel exactly as it was. Even the dissenting opinion conceded there was no precedent giving preclusive effect to an unreviewable arbitral decision. App. 12.

Petitioner argues that "[n]evertheless and notwithstanding the undeniable judicial nature of these proceedings, and notwithstanding Respondent's voluntary election to proceed in that forum, not to mention the absence of even a suggestion of caprice in the state determinations, this administrative process has now been conclusively deemed inadequate for purposes of issue preclusion." Petn. at 6. Legal writing seminars teach that when a writer has to say something is undeniable, it is often because the point is very deniable. In this instance,

as readily recognized by the majority, the lack of review and a written record meaningfully distinguishes the arbitration before the municipal court judge from a full-fledged judicial opportunity to litigate.

Petitioner's interpretation of the holding as "conclusively" deeming the process inadequate is misleading. The Ninth Circuit's holding does not alter in the least the case-by-case approach guided by the Utah Construction factors.

Petitioner then says "[t]here is scant, if any, support for this holding." That assertion turns out to mean that the issue is a matter of first impression.

Petitioner's only newly cited cases from other circuits only refer to unreviewed, not unreviewable, administrative rulings. Petn. at 7, referring to *Crossroads Cogeneration v. Orange and Rockland*, 159 F.3d 129 (3d Cir. 1998); *Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987) and *Frazier v. King*, 873 F.2d 820 (5th Cir. 1989) (cited by petitioner as 9th Circuit). After quoting from these cases, petitioner concludes "[t]hus it is clear that only the Ninth Circuit has gone so far as to deny preclusive effect to state administrative adjudications of issues simply because they were not subject to judical review, regardless of the fairness and judicial nature of such proceedings." Petn. at 8. Petitioner then does not proceed to cite other circuits that have given preclusive effect to unreviewable arbitral rulings. As admitted in the Ninth Circuit dissent, there are none. Dissent at App. 12.

Petitioner next argues that the opinion below "conclusively presumes a party has not had a full and fair opportunity to litigate an issue based entirely on the

unavailability of "judicial review." Petitioner describes the decision as a "per se approach" which somehow makes the distinction between res judicata and collateral estoppel "no longer important in the Ninth Circuit, where the only question is whether or not the procedure permits subsequent judicial review of the administrative findings."

It is difficult to find a trace of this supposed per se approach in the Ninth Circuit opinion; there appears no inclination to abandon the case-by-case approach to the test of the full and fair opportunity to litigate. To be sure, the availability of review furnishes more of a bright line test than the test of voluntariness proposed by petitioner. But there is no indication that the distinction between collateral estoppel and res judicata is "no longer important." Where review and a written record are available, future cases will undoubtedly arise testing the difference and bounds between re-litigating of whole claims and re-litigating of factual issues. Perhaps a sound reason why a written record and judicial review are essential to preclusion is that without a record, it becomes difficult to determine what was actually litigated. This is particularly important where constitutional rights enter the picture.

Contrary to petitioner's policy arguments, an opportunity to litigate constitutional claims which may have been raised in the course of arbitrating law-of-the-shop issues will not open the floodgates to a second bite in federal court. Most employment grievances do not rise to the level of constitutional due process violations. It will always be far more difficult, expensive and daunting to bring a claim to federal court than to a labor arbitration. But as illustrated by the present case, there is no policy

interest compelling enough to foreclose an employee who seeks an affirmative remedy under the law of the shop without desiring to raise a constitutional issue already pending in court, from keeping the constitutional claim alive in the court while continuing to pursue his workplace remedy. Proceeding in that manner should be encouraged, not condemned, in furtherance of judicial policies favoring exhaustion of available remedies and mitigation of damages.

CONCLUSION

The essential holding of the Ninth Circuit in this case is that an unreviewable arbitral decision without a written record will not be given preclusive effect in a section 1983 federal civil rights case. The holding is totally consistent with this Court's holding in *Elliott* that an arbitral ruling unreviewed despite available review may be given preclusive effect. The holding in *Wehrli* demonstrates the importance of the availability of judicial review and as a corollary to enable review, a written record. The procedural facts raised the issue squarely.

If petitioner were to succeed here, the new holding of this Court would be that even an unreviewable arbitral decision may be given preclusive effect, as long as the party to be charged voluntarily elected the forum. Refining the test of voluntariness would be the inevitable next stage. There is no reason in equity or jurisprudence why the law should take this path.

The Ninth Circuit resolved the issue before it correctly, without disturbing precedent of this court or other

circuits on the other important factors and criteria governing issue preclusion. The decision need not be revisited by this Court, and the petition may properly be denied.

Respectfully submitted,

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